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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 31

THOMAS MICHALIC, PETITIONER,

vs.

CLEVELAND TANKERS INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**PETITION FOR CERTIORARI FILED JANUARY 28, 1960
CERTIORARI GRANTED MARCH 7, 1960**

SUPREME COURT OF THE UNITED STATES

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A

[fol. A]

**IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Rocket No. 13,580.

THOMAS S. MICHALIC, Plaintiff-Appellant,

against

CLEVELAND TANKERS INC., Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Ohio, Eastern Division.

Appellant's Appendix

[fol. 1]

**IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RELEVANT DOCKET ENTRIES

- | <i>Date</i> | <i>Proceedings</i> |
|-------------|---|
| 7/26/56 | Complaint filed. |
| 7/26/56 | Summons issued. |
| 7/27/56 | Summons served. |
| 1/4/57 | Answers to the complaint by the defendant filed. |
| 1/7/57 | Request for trial filed. |
| 2/3/58 | Amended answer of defendant filed. |
| 2/24/58 | Jury impaneled and sworn; trial in progress. |
| 2/27/58 | Directed verdict for defendant on first cause of action and verdict for plaintiff on second cause of action (maintenance and cure) in the amount of \$2610.00, Connell, J. |
| 2/27/58 | Order dismissing the first cause of action. Further order that plaintiff recover from defendant, on the second cause of action, the sum of \$2,610.00 and costs, for maintenance and cure, filed. |
| 3/25/58 | Notice of appeal by plaintiff filed. |
| 4/25/58 | Certified original pleadings mailed to the clerk for the Court of Appeals. |

[fol. 2]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed July 26, 1956

Plaintiff, by S. Eldridge Sampliner and Victor G. Hanson, his attorneys, for his complaint, alleges as follows:

For a First Cause of Action

First: That all times hereinafter mentioned, the defendant was and still is a corporation, duly licensed to do

business in the State of Ohio and having an office and principal place of business in the City of Cleveland, Ohio.

Second: Upon information and belief, that at all times mentioned herein, defendant owned and/or managed, operated and controlled a certain Merchant Marine vessel, known as the SS Orion, a vessel duly enrolled and licensed for the coasting trade, and engaged in the business of commerce and navigation on the Great Lakes and their connecting tributaries, and being a vessel of more than twenty (20) tons burden, and at all times mentioned herein, employed in the business of commerce and navigation between places in different states and territories, upon the Great Lakes and foreign countries and navigable waters connecting the Great Lakes.

Third: That during the month of December, 1955, plaintiff was in the employ of the defendant and under articles as a seaman, at the specified rate of pay of \$500.00 per month base pay including overtime and found.

Fourth: That plaintiff is a seaman, and at all times hereinbefore mentioned there was, and still is in force and effect, an Act of Congress known as the Merchant Marine Act (Title 46 U. S. C. A., Chapter 18, Section 688) approved June 5th, 1920, Section 33 of which provides as follows:

"That any seaman who shall suffer personal injuries in the course of his employment, may, at his election [foi. 3] maintain an action for damages at law, with the right of trial by Jury, and in such action all Statutes of the United States modifying or extending the common law, right or remedy in cases of personal injury to railway employees shall apply."

Fifth: Plaintiff says that sometime during the month of December, 1955, on a day certain, within the knowledge of the defendant, and while the vessel at all times mentioned herein was upon the waters of Lake Erie, berthed at her dock in the Port of Cleveland, Ohio, and while in the pursuance of his duties under peremptory orders and exercising due care and caution for his own safety, the First Assistant Engineer before noon ordered the plaintiff to assist the pumpman in the pump room, and while in the

process of taking off the nuts on the pump, while using a heavy wrench, suddenly, and unexpectedly the wrench slipped off the nut and fell several feet and violently and forcibly struck the large toe on his left foot. Plaintiff further avers that he was ordered to perform said work in close quarters, using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective. Plaintiff says that as a result thereof, he sustained severe and painful injuries, necessitating an amputation of his left foot below the knee.

Sixth: That his said injuries, hereinafter stated, were not caused by any negligence, fault, or want of care on plaintiff's part, but wholly and solely by reason of the carelessness and negligence of the defendant, their servants, agents, and employees, acting within the scope of their employment,

in negligently and carelessly failing to provide plaintiff a safe place and a safe way for him to perform his work upon said vessel,

[fol. 4] in failing to warn or apprise said plaintiff when the defendant knew or in the exercise of ordinary care should have known of the conditions existing thereat and of the dangers incident thereto,

in negligently and carelessly failing and neglecting to exercise ordinary care for plaintiff's life and limb while he was employed on said vessel as a seaman,

in improperly placing the wrench on the nut, when the defendant knew or in the exercise of ordinary care should have known that the teeth of the wrench would not hold or be secure,

in negligently, knowingly, ordering, permitting, and allowing plaintiff to work in the position alleged aforesaid, in close quarters, when the defendant knew, or in the exercise of ordinary care should have known of the condition of the defective teeth of the wrench,

in negligently and carelessly maintaining, equipping, and providing said vessel, with a defective wrench, all as aforesaid,

in negligently and carelessly failing to maintain, equip and provide a proper and secure wrench which

would not loosen when average pressure would be applied,

in negligently and carelessly failing and neglecting to provide adequate proper and seaworthy and reasonably safe appliances, to wit: a proper wrench without worn teeth;

in negligently and carelessly permitting, peremptorily ordering and allowing plaintiff to work thereat, as aforesaid, when the defendant knew or in the exercise of ordinary care should have known of the [fol. 5] perilous position of the plaintiff, which was open and obvious to the defendant at all times, and failed to maintain a proper lookout for the plaintiff,

in negligently and carelessly failing and neglecting to properly supervise the removal of the nuts off the pump or regulate or direct such work with due and proper precaution for the safety of this plaintiff,

in negligently and carelessly failing to replace said defective, old, and unseaworthy wrench,

in negligently failing to furnish plaintiff with an adequate number of officers and co-employees and to provide plaintiff with skillful, careful and competent co-employees, master and other officers,

in failing to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances and means.

Seventh: That as a direct and proximate result of the defendant's negligence in one or more of the aforesaid matters, the plaintiff then and there sustained severe and painful injuries, both externally and internally, and suffered a severe shock to his nervous system, and that he sustained a severe injury to his left foot, which eventually necessitated an operation, amputating his left leg below the knee. That he has been advised that there is a possibility of the necessity of a future operation, involving further amputation. That there is an involvement of the bones, muscles, tendons, ligaments and structures of the remaining portion of his left leg, and that he became and was sick and disabled, and suffered and will in the future suffer great pain and discomfort and physical impairment and embarrassment, all of which injuries are permanent, and that he has

lost and will lose great gains which he otherwise would [fol. 6] have made and acquired, and that he will suffer a loss of earnings in the future, and plaintiff may be required to incur obligations for medical and surgical aid and attendance, and nursing care, and plaintiff was otherwise injured, all to his damage in the sum of Three Hundred Fifty Thousand Dollars (\$350,000.00).

For a Second Cause of Action

Eighth: Plaintiff repeats and realleges all the facts set forth in the First Cause of Action with the same force and effect, as though pleaded herein in full, omitting all allegations of negligence, unseaworthiness, pain and suffering, loss of wages, and diminution of earning capacity and any and all claims other than for amounts needed to maintain and cure himself in and about his care while disabled and unable to work, including both past maintenance and cure and maintenance and cure for a reasonable period in the future, and that defendant was under duty to further furnish said maintenance and cure, but breached the same.

Ninth: That plaintiff, as a result of the foregoing, has expended and will expend for a reasonable period of time in the future for his maintenance and cure, while disabled and unable to work, the sum of Thirty-one Hundred Dollars (\$3100.00), all to his damage in the further sum of Thirty-one Hundred Dollars (\$3100.00).

Wherefore, plaintiff demands trial by jury and judgment against the defendant in the sum of Three Hundred Fifty-three Thousand One Hundred Dollars (\$353,100.00), together with the costs and disbursements of this action, and further prays that he be permitted to prosecute this action without advancement of or give security for costs under favor of the Statutes of the United States in such [fol. 7] cases made and provided, particularly Chapter 113, 40 Statutes, 688 U. S. Code, Title 28, Section 1916.

S. Eldridge Sampliner, Attorney for Plaintiff, 301
Caxton Bldg., 812 Huron Road, Cleveland 15, Ohio
—MAin 1-4250.

Victor G. Hanson, Attorney for Plaintiff, 15921 West
Seven Mile Road, Detroit, Michigan—VErmont
7-4742.

Jury Demand

Now comes the plaintiff, Thomas S. Michalic, and demands a trial by jury of the within cause, as by the statutes of the United States in such cases made and provided.

Thomas S. Michalic, By S. Eldridge Sampliner, One
of his Attorneys.

[fol. 8]

IN UNITED STATES DISTRICT COURT

Excerpts From Testimony

Plaintiff's Testimony

Direct examination of THOMAS MICHALIC.

By Mr. Sampliner:

Q. Try to keep your voice up so that all the jurors can hear you, please.

A. Yes, sir.

Q. Now, what is your full name?

A. Thomas Michalic.

Q. Do you have a middle name?

A. Thomas S. Michalic.

Q. What is your address?

A. 1931 Warren Street, Dearborn, Michigan.

Q. How long have you been sailing on the Great Lakes?

A. Oh, off and on for about four years.

Q. And have you been in the Armed Forces?

A. Yes, sir.

Q. How old are you?

A. Forty-four.

Q. You have a daughter 17 years of age?

A. Yes, sir.

Q. Now, recalling to you the SS Orion, when did you join, if you can recall, the Steamer Orion as a fireman?

A. I joined her in 1956 in October.

Q. October?

A. October.

Q. What year was that?

A. 1955.

Q. What city did you join her at?

A. Erie, Pennsylvania.

Q. Prior to that time had you worked for the Cleveland Tankers all the time?

A. Yes, sir; not all the time, no.

Q. How long had you been employed by Cleveland Tankers?

A. About three years.

Q. Did they assign you to this vessel SS Orion in October?

A. Yes, sir.

Q. What was your job?

A. My job was to be a fireman.

[fol. 9] Q. And when you were on board the SS Orion did you perform the duties of a fireman?

A. Yes, sir.

Q. Would you be kind enough to tell the Court and jury what the duties of a fireman are on board the Steamer Orion?

A. The duties of a fireman on board the Orion is to keep the steam pressure up and watch the water in the boiler.

Q. In that particular job where did you work on that vessel?

A. I worked in the firehold.

Q. In the SS Orion is the engineroom and the firehold combined?

A. Yes, sir.

Q. Now, can you tell us what portion of the vessel the engineroom and the firehold are in?

A. In the after end.

Q. Now, do you work under orders?

A. Yes, sir.

Q. Who was your superior officer?

A. My chief engineer, first assistant, second assistant, third assistant.

Q. And do you do anything except what they tell you to do, do you follow out their orders?

A. I followed orders, yes, sir.

Q. Now, as a fireman were you certified by the United States Government through the Coast Guard to perform the duties of a fireman?

A. Yes, sir.

Q. And ~~is~~ a member of the crew of the SS Orion?

A. Yes, sir.

Q. Now, what was your rate of pay on this vessel, if you can recall?

A. It was about \$550 pay monthly.

Q. \$550 was paid monthly. And did you live and sleep and eat on board the vessel?

A. Yes, sir.

Q. That was in addition to your pay?

A. Yes, sir.

Q. Now, recalling to you the month of December, 1955, where was the vessel?

A. The vessel was here in Cleveland on Whisky Island.

Q. And is that down in the Flats here in Cleveland?

A. Down in the Flats here in Cleveland, yes, sir.

Q. Can you tell us about an occurrence which happened in December, 1955?

A. In December, 1955 I was ordered to go into the pump-room to assist the pumpmen.

[fol 10] Q. Who ordered you to go in?

A. The first assistant.

Q. Where did you receive the orders?

A. I received my orders in the firehold.

Q. Can you remember what the words were?

A. The first assistant told me, he said, "Tom you go help the pumpman in the pumproom."

Q. What time did he give you that order?

A. About 8:00 o'clock in the morning.

Q. Was the pumpman there?

A. The pumpman was in the firehold with me.

Q. Then what did you do?

A. Me and the pumpman, we walked out of the firehold and walked in the pumproom.

Q. When you say you walked out of the firehold, could you go from the engineroom and the firehold into the pump-room without going out on deck?

A. No, sir.

Q. All right, tell us what happened: did you go into the pumproom?

A. Me and the pumpman got into the pumproom; yes, sir.

Q. What did the pumpman do and what did you do, or what did he tell you?

A. Well, the pumpman told me, he said, "Tom, I want you to work on this pump here. I am going to work on that pump over there, that is, the pump on the starboard side."

Q. Now, would you go ahead and point on that drawing—does that drawing represent a true representation?

A. Yes, sir.

Q. Go ahead.

A. That's a pump right there (indicating on blackboard drawing).

Q. Now, would you be kind enough to tell us or describe that pumproom? Can you tell us the dimensions of the pumproom?

A. Well, I can't tell you how large the ship is but when I was ordered to go into the pumproom, this is the catwalk goes from one end of the ship, from the starboard to the port side. I was ordered to work on this pump here. So the pumpman told me, he said, "Here, Tom, here is a wrench." It was a big wrench, old beat-up wrench. Even [fol. 11] the pumpman himself said, "Tom, we have a bunch of bad tools."

Mr. Ray: If the Court please, I object.

The Court: Do you have a request?

Mr. Ray: I have an objection.

The Court: Based on what?

Mr. Ray: Based upon hearsay and the conclusion of the witness. He is describing what he said the pumpman said about the condition of the wrench, that it was old and beat-up.

The Court: What the pumpman said will be stricken. I think the gentleman better be seated and testify like anybody else.

Q. Now, Tom, as you got to this pump, what else did the pumpman hand you besides this wrench?

A. Well, he handed me the wrench and he handed me an old lead mallet they used in the pumproom.

Q. Can you describe this wrench?

A. It is about a foot long.

Q. Was it an adjustable end or open end wrench?

A. It was an open end wrench. It was an old wrench, all chewed up on the end.

Q. Now, did you have to get off the cat-walk?

A. Yes, sir. I had to get off that cat-walk and I had to crawl between four beams that hold the pump from vibrating, work underneath the cat-walk.

Q. Now, did the pumpman order you to do this work?

A. Yes, sir.

Q. What did he do after he ordered you to do the work?

A. After he told me what to do he walked to his pump.

Q. You say he ordered you to do the work?

A. Yes, he showed me how to remove the head bolts.

Q. How many bolts were there on this pump?

A. I figure there was about 40 bolts.

[fol. 12] Q. After he showed you did you start to work?

A. Yes, I continued on my pump.

Q. Where was he?

A. Well, the pumpman was standing on the cat-walk, looking around and he said, "Tom, I am going to leave, I am going up in the forward end to turn off a valve." The water was dripping on his pump.

Q. Which pump was he working on?

A. On the starboard side.

Q. On the port side or starboard?

A. On the port side here. I am sorry.

Q. What was the illumination at that particular time as far as the pumproom was concerned?

A. As far as that pumproom is concerned, to my estimation it was poor, very poor.

Q. Where was the light?

A. The light was way up on the side of the ship, on the top.

Q. Was it a portable light?

A. Portable light.

Q. Did they have any other electricity?

A. No, sir, they only had shore lights, that's all.

Q. As far as the illumination in that room, what other illumination was there besides the portable light?

A. Nothing; that's all we had, just the portable light.

Q. And where was it hanging?

A. The portable light was hanging over the pumpman's pump on the port side. He had a string tied to it and it was hanging right down beside his pump.

Q. Go ahead and tell us about removing the bolts and nuts.

A. Well, after the pumpman took and walked to his pump, he came back to me and told me, "Tom, I have to go to the forward end", and that left me all alone in the pump room.

Q. Did he leave?

A. I told him, I said, "This tool is not very good, kind of beat up. It's very cold down here." I said, "This wrench keeps slipping off." He said, "Never mind about that," he said, "do the job as best you can."

[fol. 13] Q. Did you do the work?

A. I did the work to the best of my ability.

Q. Now, you say he went forward?

A. He went up to the forward end, yes.

Q. What did you do?

A. I stayed in the pumproom. I did my work down there and waited till he returned.

Q. While he was away did you attempt to pull that portable light over to where you were working?

A. Yes, I did. I attempted to move it over to where I was but it was too short, it wouldn't reach my pump at all.

Q. What happened after you took off the bolts and nuts?

A. After I started taking the bolts off with the old wrench, only about three or four more to get loose, a couple of them, I had hold of a nut and I had to it and I hit the wrench and it slipped off and it hit me on the foot at the big toe.

Q. Which toe?

A. On my left leg.

Q. Now, going back to the engineroom and firehold, do they have the turbines there for the steam?

A. They have the turbines for steam and they have the Diesels for power. Both Diesels were down. They were overhauling both Diesels.

Q. Now, did the pumpman come back to the pumproom at any time?

A. Yes, he came back about two hours later.

Q. Now, did you think there was anything serious when you dropped that wrench on your toe?

A. No, sir, my feet were so cold and froze, I was even standing in water down there, all my feet was froze, there was no heat, no steam of any kind down there. I had to stay down and wait for the pumpman, I couldn't leave my job down there.

Q. As you were working there you stated you had to get between four beams. Can you describe them a little bit?

A. Yes, I can. The four beams, they held the pump. When the pump is pumping out cargo in a port the four steel beams that comes around the pump keep the pump from vibrating when they are pumping out.

[fol. 14] Q. What is the distance from the top of the pump to the cat-walk where you had to go in there and work?

A. About six inches.

Q. Is that the area you had to work?

A. Yes.

Q. Was there any light provided at the cat-walk, in that area at all other than what you have described?

A. No, sir.

Q. Go ahead and tell us whether or not you continued to work after this occurrence in December?

A. Yes, I finished my job on my pump there, took all the bolts off, took off the bolts and laid them up on top of the cat-walk. I crawled out from underneath the pump, crawled up on the cat-walk and walked over to his pump and sat down and waited for the pumpman to return.

Q. Now, did you work the rest of the day?

A. Yes, sir.

Q. Did you work the next day?

A. Yes, sir.

Q. Did you place any sock on your toe of your left foot?

A. Yes, sir.

Q. Did it hurt you at any time?

A. It hurt me terrible, yes, sir.

Q. Did you continue to work at your job?

A. Yes, sir, I laid the ship up.

Q. How long did you work there?

A. I laid her up, I was the last man off the ship.

Q. When was that?

A. It was in the month of January some time.

Q. When you finished working on the Orion where did you go?

A. I went right straight back to Erie, Pennsylvania.

Q. While you were on the vessel, up to the time you left in January did you do anything relative to your toe, soak it or anything?

A. Yes, I took my leg when I went home, I soaked it in hot water, Epsom salts, stuff like that when I was home.

[fol. 15] Q. Do you recall whether or not after you got hurt you made any trips to the Marine doctor, Dr. Reister in Erie, Pennsylvania?

A. No, sir.

Q. You didn't. All right, now, did you rejoin the ship?

A. I got a letter from the Union Hall out of Detroit, Michigan, telling me to rejoin my ship, which I did.

Q. From the Union Hall?

A. From the Union Hall.

Q. You got orders to rejoin the vessel?

A. Yes, sir.

Q. When was that?

A. That was the 15th of March.

Q. Where did you rejoin the vessel?

A. In Cleveland, on Whisky Island.

Q. And you rejoined her here in March, is that right?

A. Yes, sir.

Q. During this time and after you rejoined her were you still bathing your toe?

A. Yes, sir.

Q. Now, what happened when you got back to the ship in March?

A. Well, when I got back to the ship in March I went back as a fireman, as usual, and I made a few trips on the tanker Orion. My leg was so bad, so painful, I couldn't take it no more so we pulled into Toledo, Ohio, and I told the engineer, I said, "I have to get off." I said, "I want a hospital ticket." He said, "All right." So I got off in Toledo and I went back to Erie, Pennsylvania.

Q. Before you got off did you make out any accident report from the time you joined the vessel from March 15th up to the period you got off in April?

A. No, sir.

Q. Did they make out an accident report, do you know?

A. I don't know, sir.

Mr. Sampliner: Do you want me to introduce the original accident report or wait ~~me to~~ use a photostat?

Mr. Ray: Whatever you care to.

Mr. Sampliner: I offer in evidence Plaintiff's Exhibit 1.

Mr. Ray: No objection.

The Court: It may be received.

[Vol. 16]. Q. Did you tell Dwight H. King, the Master of the SS Orion, on the 1st of April, 1956, when he gave you your hospital ticket when you left the vessel about dropping a wrench on your foot?

A. Yes, sir.

Q. And did he ask you questions as to whether or not Walter Peterson of Cleveland Tankers was in charge of the work at the time it happened?

A. Yes, sir.

Mr. Ray: I object, your Honor.

The Court: The answer is in, so it may remain.

Mr. Sampliner: Your Honor, can I pass this around to the jury or may I read it?

The Court: Maybe if you read it it would save time.

Mr. Sampliner: This is "Report of injury to employee or other person.

"Instructions—in event of injury, however slight, fill out this blank in detail and send at once to your employer. In case of fatal or serious injury, telephone or telegraph at once. Name of vessel—SS Orion.

In whose employ at time of accident? Cleveland Tankers, Inc.

Injured person's name—Thomas Michalic, Jr.

Address in full—951 West Sixth Street, Erie, Penna.

Married or single—Single.

Children or dependents—how many? One.

Position held—Fireman. How long employed? 8-31-55 to 4-1-56. Wages \$369.26 per m.

Date of accident—12-28-55. Approx. 1955. Hour unknown. Was light good?—Yes.

Port or location of vessel when accident occurred—Cleveland, Ohio.

Exact location on boat or dock where accident occurred.—Pumproom while ship was laying up at Allied Oil dock on Whisky Island.

[fol. 17] State fully how the accident happened, its causes, etc., illustrating, if possible, by a rough sketch.

While working with pumpman in pumproom man said he dropped a wrench on his foot and his toe has been sore ever since.

Was machinery, tools, staging, ladder, etc., connected with the accident sound and in good working order?—Yes.

Name and extent of injuries?—Foot infection in big toe on left foot.

Where taken after the accident?—No apparent injury so man stayed on vessel.

Did injured person remain aboard ship?—Yes.

Attending doctor's name and address.—U. S. Marine Hospital, Detroit, Michigan.

Probable period of disablement.—Unknown.

If to hospital, which one?—Above.

Has injured done similar work prior to this employment?—Yes.

What instructions had been given the injured person?—Advised to go to hospital by ship's officer.

By whom?—Richard Hostetter, 1st Assistant Engineer.

Name and address of foreman in charge of work?—Walter Peterson, Cleveland Tankers, Cleveland, Ohio.

Where was he at the time, and what was he doing?—Unknown.

Was accident due to want of ordinary care on part of injured person, if so, how?—Unknown.

Was he sober?—Unknown.

Was accident due to negligence of any other person, if so, how and of whom?—No.

Give statement made by injured person as to cause of accident and names and addresses of those who heard it.

[fol. 18] Man stated that he dropped wrench on foot in pumproom while helping pumpman. As of 4-1-56 the pumpman does not recall any such accident.

Names and addresses of all witnesses important.—None.
 Dated at Toledo, Ohio, on the 1st day of April, 1936.
 Notice made out by Dwight H. King.

Whose position in our employ is Master SS Orion."

The Court: Don't take time to pass it around. You have read it and it will go to them as an exhibit later.

Q. Now, Tom, when you got off the vessel around April 1st, where did you go?

A. I went back to Erie, Pennsylvania where I was staying, living.

Q. What did you do?

A. When I went home a few days I called up Dr. Reister, the Marine doctor, and I told him about my troubles, so he said, "Well, Tom, soak it in some hot water and Epsom salts for a few days." I did that. No relief. So I made a trip to Dr. Reister. He examined my toe. He said, "Well, Tom, you have a bad leg, the toe has a little infection." So he said, "Maybe a shot of penicillin will clear it up." So he gave me a shot of penicillin. A couple of days later I made another trip to Dr. Reister and he gave me another shot of penicillin. I went to Dr. Reister three or four times. The last time he said, "Tom, that foot looks very bad. I advise you to go to the Marine Hospital, Detroit, Michigan." So I left that night for Detroit. I arrived at Detroit, Michigan, 7:00 o'clock the following morning.

Q. What did you do when you arrived there?

A. When I arrived in Detroit the following morning I was admitted to the hospital at 10:00 o'clock and I was put to bed. Dr. Brumback examined by leg. He said, "Well, [fol. 19] Tom, we are going to put your leg in a heat tent." So they put my leg in the heat for about a week and no results. So the following Saturday morning he and Dr. Valle comes in and they said, "Well, Tom, that toe doesn't look too good. I think we will have to take the toe nail off." The following morning they took the toe nail off, they operated.

Q. Go ahead, tell us what happened?

A. After they took the toe nail off, it was about a week later they come around—they make the rounds every Saturday—it started to get pretty black, so they turned away and said, "Tom, it looks like you are going to lose your big toe". The following Monday morning they took me to

surgery and cut the big toe off. They took me back to my room, put me to bed, and a week later the leg was black and blue and necrotic, and they waited a couple of more days and said, "Tom, we are going to have to cut your leg off about here, just above the ankle." That following Monday they cut the leg off there above the ankle. They wanted a few days and still there was drainage, a lot of drainage coming out, and the following Saturday Dr. Valle looked at it and Dr. Brumbach and he said, "Tom, that leg doesn't look too good. We are going to have to cut some more." So they cut again, just below the knee this time, like, took it off like that (indicating). So when they cut it off here it did look pretty good but it still started draining, a lot of drainage, still gangrenous, so Dr. Valle said, "Well, we will give it a week." They gave it a week and the following Saturday he comes around again and said, "Well, Tom, we have to take your leg off above the knee." The following Monday they cut it off above the knee. That was the end of my amputations.

Q. When did you find out you had Buerger's Disease?

A. I found out I had Buerger's Disease in 1952 when I was sailing for the Pittsburgh Steamship Company.

[fol. 20] Q. Tell us about that, how did you happen to find out about that?

A. Well, I developed a pain in the calf of my leg and my walking, I couldn't walk too far. If I walked about a half a block I would have to stop. I couldn't walk the whole length of the deck of the ship. So I got off the ship and I got a hospital ticket and went to Detroit Marine Hospital and I was operated.

Q. So we understand, the United States Public Health Service Hospitals, which you call Marine Hospitals, they are free of charge to the seamen, aren't they?

A. Yes.

Q. All you need is a hospital ticket from the ship to gain admittance?

A. Yes, sir.

Q. Then you were telling us you went to Detroit. What happened while in Detroit Marine Hospital in 1952?

A. Well, they gave me a little Buerger's Disease trim; there, which didn't help me out at all. They did a blocking in my back, stuck about twenty needles down my back and cut me here on the side, cut a nerve in my back, which relieved the pain in my leg.

Q. What kind of discharge did they give you after they released you from the hospital?

A. I got a discharge, recommended for duty.

Q. Were you declared fit for duty?

A. Fit for duty, yes, sir.

Q. Were you allowed any days of convalescence before going back to duty?

A. I had fourteen days.

Q. After your fourteen days did you go back into the service of any ship?

A. Yes, sir, I went back to the Cleveland Tankers.

Q. You said when you discovered this condition you were with the Pittsburgh Steamship Company on a lake vessel. Did that mean when you were returned as fit for duty you could go from ship to ship?

A. From ship to ship.

[fol. 21] Q. You went back; in other words, previous to the time you were on the Pittsburgh ship you had worked for the Cleveland Tankers?

A. Well, I worked for the Pittsburgh Steamship Company first, then I went in 1952, after I came out of the Marine Hospital, after surgery and I had the fourteen days, I went back on the tanker Meteor.

Q. Does that belong to the Cleveland Tankers?

A. It belongs to the Cleveland Tankers.

Q. Then what happened?

A. I sailed on her for almost two years.

Q. Now, Mr. Tom Michalic, in addition to the accident report made out by the Captain, did you yourself report the accident to any other members of the crew?

A. Yes, sir.

Q. Do you remember any one of them?

A. I told the boiler-fireman and a couple of forward engine crew working at the after end.

Q. Did you tell any of the officers?

- A. I told the Third Mate at that time.
 Q. Who was the Third Mate?
 A. His name, last name I don't remember. Harold is all I know him by. He is the mate from Toledo.
 Q. Can you tell us your present physical condition?
 A. It is good.
 Q. Tell us about your ability to get about with your prothesis?
 A. I get along fairly good.
 Q. What was the condition of your health and physical being previous to the time in December 1955 that you had your injury?
 A. Good.
 Q. Were you able to work before the accident?
 A. Yes, sir.

[fol. 22] Cross examination of Thomas S. Michalic.

By Mr. Ray:

- Q. Mr. Michalic, did you report that you had dropped a wrench on your foot to the pumpman?
 A. No, sir.
 Q. How soon after you dropped this wrench on your foot did he come back into the pumproom?
 A. Oh, he was gone a couple of hours. He come in there about 11:00 o'clock, just before lunch time.
 Q. He was the first man you saw after the accident?
 A. Yes, sir.
 Q. You say you reported the accident to the Third Mate. That date was in April?
 A. Yes.
 Q. You didn't report it to any officer at the time in December, did you?
 A. In December, no, sir.
 Q. So that this accident that occurred to you on the 28th of December was not reported to a single individual on that vessel?
 A. Yes, I told a couple of deck hands but no officer?
 Q. Not the pumpman?
 A. Not the pumpman.

Q. Now, let's go back to 1951. In 1951 you sailed on the Steamer William Irwin for the Pittsburgh Steamship Company, didn't you?

A. Yes, sir.

Q. While you were on that vessel you dropped a sack of cement on your foot, didn't you?

A. Yes, sir.

Q. And as a result of dropping that bag of cement on your foot your foot was injured, wasn't it?

A. Yes, sir.

Q. Were you hospitalized as the result of that injury?

A. I went to the Marine Hospital, yes, sir.

Q. So as early as 1951 you were aware you had some difficulty with the circulation in your legs, isn't that a fact?

A. No, sir.

Q. What kind of treatment did they give you in Marine Hospital for that injury?

A. They put my leg in a tent; that's all.

[fol. 23] Q. Were you told what type of disease you had?

A. Not until '52.

Q. 1952?

A. Yes, sir.

Q. Now, at the time the diagnosis of Buerger's Disease was made were you told what type of disease that is?

A. Dr. Brumbach told me he diagnosed it as Buerger's Disease.

Q. Did he tell you what Buerger's Disease is?

A. Yes.

Q. So that from 1952 you were aware, were you not, that you had a circulatory trouble of a very serious nature in both your legs?

A. Not both my legs, just the one leg.

Q. That's the leg involved right on this report, your left leg?

A. Yes, sir.

Q. Now, which officers, if any, of the Orion did you tell you had Buerger's Disease?

A. Well, I told this here Howard Isenbach, the Third Mate, at that time.

Q. At what time?

A. In April, when I got off the ship.

Q. That is, April of '56?

A. Yes, sir.

Q. Did you tell anyone else?

A. I told a couple of deck hands working in the after-end, helping lay up the ship. I told the fireman.

Q. Prior to that you hadn't told anyone on the vessel you had had Buerger's Disease, is that correct?

A. Yes, sir.

Q. In the pumproom of the Orion there are three pumps, are there not?

A. Well, sir, I don't know. I just know of two.

Q. One on the port side and one on the starboard side and one about amidships?

A. That's the one I was working on, midship—the two pumps I know.

Q. The one amidships?

A. That one right there (indicating on drawing).

Q. I thought on direct examination you pointed out the pump on the starboard side.

A. That's the one I was working on, yes. I was working on this pump right here.

Q. Is there one on the port side also?

A. No, sir, I don't think there was. Not that I recall.

[fol. 24] Q. How high was this casing you were working on above the deck of the pumproom?

A. You mean the cat-walk?

Q. I am talking about the casing. How far above the deck was the casing?

A. It was a good two or three feet.

Q. Above the casing we are talking about there was a cargo pipe, wasn't there, that is used to discharge the cargo from the vessel?

A. Yes, sir.

Q. That is about two and a half feet above the casing we are talking about, the casing being the one you were working on?

A. Are you talking about the pump, the pump head? I don't call it a casing.

Q. The pump head?

A. That's right.

Q. There was a cargo discharge pipe about two and a half feet above that pump?

A. Yes, sir.

Q. Was there any cat-walk in the area of that pump you talked about?

A. Yes, sir.

Q. Where was that located?

A. It goes across the ship.

Q. But is it right over the casing or to the side?

A. Half way over. It is half way over the casing.

Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped?

A. I had them all off but about five or six.

Q. You took those off without difficulty?

A. I had a hard time loosening them off.

Q. But you got them off?

A. Yes.

Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and then you turned the nuts off?

A. I had a hard time taking them off.

Q. But you took them off?

A. Yes, the pumpman told me, "Do the best you can".

Q. You got them off and you got all but how many off at the time the accident occurred?

A. About five.

Q. And you were using the same wrench?

A. The same wrench.

Q. And the same mallet?

A. Same mallet all the way through.

[fol. 25] Q. Did you have gloves on when you were doing this?

A. No, sir. The fireman never works with gloves on.

Q. Are there portholes in that pumproom?

A. Yes, I think there is four.

Q. And this accident happened in the daytime, didn't it?

A. It happened in the morning, about 9:00 o'clock.

Q. What is the size of those portholes?

A. About six inches in diameter.

Q. Six, you say?

A. I would say about six inches.

Q. That is your best recollection how large those port-holes are, is that correct?

A. Yes, sir.

Q. Now, where did this portable light you are talking about, where did it lead from?

A. It must have been coming out of the firehold.

Q. It was hanging on this pipe?

A. It was hanging over the pipe, down over the top of his pump.

Q. Of his pump?

A. Of his pump.

Q. You had nothing by you at that time?

A. No, sir, I never had nothing by my pump.

Q. You didn't bother to move that?

A. I tried to move his portable light, but it wouldn't reach.

Q. Did you try to relocate that light?

A. No, sir.

Q. You went over and tried to move it and because it did not move you went back about your business?

A. Went back to work.

Q. And you got all but five of the nuts off and then the wrench slipped, is that true?

A. Yes, sir.

Q. Are you familiar enough with the working of that vessel to know how often those casings are taken off?

A. No, sir, that's the first time I worked in that pump-room.

Q. You worked for about three years, you say, on Cleveland Tankers boats?

A. Yes, sir.

Q. You know as a fact that pump that is only taken off and put on twice a year; isn't that a fact?

A. I don't know. That's the first time I worked in the pumproom. I was a fireman.

[fol. 26] Q. The vessel is quite a small entity; you are around the pumproom?

A. No, sir, I don't go around the pumproom. I am a fireman and I come in the firehold and that's all.

Q. Would you say, if I told you it is only removed twice a year, would you think that would be pretty accurate?

A. I couldn't say.

Q. You don't know enough about it?

A. I don't know a thing about the pumproom. I was ordered by the first assistant to go in the pumproom and help the pumpman.

Q. Where did you get the wrench that you used?

A. Mr. Hanson, the pumpman, gave it to me.

Q. Did he give it to you the minute you went into the pumproom?

A. Yes, sir.

Q. Did he get it from any tool box?

A. No, sir, I don't know.

Q. You don't know where he got it?

A. He had it.

Q. You didn't see any tool box in the pumproom?

A. I think he had a tool box setting on top just as you come into the pumproom.

Q. Did you become aware that this wrench, as you have described, was getting worn as you were taking those nuts off?

A. I told him about it, yes, sir.

Q. Did you go out and try to get another wrench out of the box?

A. No, sir; he told me, "You do the best you can with that wrench right there".

Q. He told you not to use another wrench?

A. He said, "You do the best you can with that wrench right there".

Q. That's the only wrench you could use?

A. The only wrench I had to use.

Q. Were you aware there were Stilson wrenches in that box?

A. Which box?

Q. The tool box.

A. There were no Stilson wrenches. I didn't see any.

[fol. 27] Q. Then you went up to the box to look?

A. I didn't look in the box.

Q. Well, how do you know?

A. Because I seen the tool box when I was coming into the pumproom that morning.

Q. Did you look at it?

A. No, I didn't look in nothing.

Q. You can't tell the Court and jury what type of wrenches were in that tool box?

A. No, sir, I could not.

Q. Now, in the light of the experience you had had as far back as 1951 and then in 1952 you were pretty much aware when your toe became damaged it was a rather serious thing, weren't you?

A. Well, when I had that operation done in 1952 in the Marine Hospital at Detroit, Michigan, why, my leg improved a hundred percent. I was discharged. I had fourteen days' rest. I never had any trouble with my foot at all.

The Court: I don't think that is an answer to the question. Would the reporter read the question?

(Question read.)

A. Yes, sir.

Q. Well, in the light of that knowledge, Mr. Michalic, what would you do take care of your toe after this wrench dropped on it?

A. Well, I went up into my quarters and I took a hot bath, and when I got through with the hot bath I had a bucket and with some Epsom salts the steward gave me I soaked my foot in Epsom salts.

Q. You knew you had a great deal more than a sore foot, in the light of your previous experience?

A. I didn't think I was hurt too bad.

Q. How soon after this accident did your toe nail become festered?

A. Oh, about a week after that.

Q. That didn't make you concerned, is that right?

A. No, sir, I thought it would clear up.

.

Q. Now, will you describe with as much particularity as you can just how the wrench slipped off the nut?

A. Like I say, I had the wrench in my hand.

[fol. 28] Q. You were standing next to the pump?

A. I was standing. I got hold over here, and I hit it with the mallet and it slipped off the nut and came down the side of the pump and hit my big toe.

Q. You hit the handle of the wrench with the mallet?

A. Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe.

Q. That's exactly the way you did it on all the others?

A. I had to use the mallet on all the nuts, that's right; they were pretty tight.

Q. In other words, you had gone through the same maneuver on the others as you had with this?

A. Yes, sir.

Q. Did you have any difficulty putting the wrench on the nuts before hitting it with the mallet?

A. Yes, sir, they slipped.

Q. What slipped?

A. The wrench did.

Q. As you were putting the bolts on?

A. I wasn't putting the bolts on.

Q. I am talking about putting the wrench on the nuts. Did you have any difficulty putting the wrench on the nut you took off?

A. I told you the wrench was slipping off the nuts; it slipped off every one of them.

Q. You had no difficulty seeing the bolts, did you?

A. No, sir.

Mr. Ray: That's all.

Redirect examination of Thomas S. Michalic.

By Mr. Sampliner:

Q. On these portholes Mr. Ray asked you about, can you tell us where those portholes were located, if you can recall?

A. Yes, sir. Here is the pumproom, right here, that's the width of the pumproom. This is the firehold, back here, and there is your portholes—one here, one here, one here—I can't recall if three or four, but I will say there is four.

[fol. 29] Q. Those portholes or port lights were between the engineroom and the pumproom, they weren't at the skin side of the ship at all, were they?

A. No, sir.

Q. Now did those portholes add any illumination to the place?

A. Those portholes were all dirty and greasy from grease flying around the pumproom.

Q. When you say "portholes" do you mean the "port light" with a pane of glass on the porthole?

A. A pane of glass in the porthole. We call them a dead-light, if you want to call it a dead-light.

Q. Is that the nautical phrase, dead-light?

A. Dead-light.

Q. Now, on the Orion, when did you first join the Steamer Orion?

A. I joined her in October of '56.

Q. '55?

A. '55.

Q. Was that the first time you ever sailed on the Orion?

A. Yes, sir.

Q. How many other ships of the Cleveland Tankers were you on?

A. I have been on one more, that was the Tanker Meteor.

Q. Just the Meteor and the Orion for the three years you worked for the Tankers?

A. Yes, sir.

Q. When you were on the Orion, when you first came on duty and worked there, did you ever have occasion to tell any members of the crew of the Orion or the officers you had Buerger's Disease?

A. Well, they knew I had Buerger's Disease.

Mr. Ray: I object.

The Court: Sustained.

Q. Who did you tell?

A. I told Dick Hostetter, the first assistant. I told the third assistant. I told the mate.

Q. You kept right on working?

A. I kept right on working, yes, sir.

[fol. 30] Q. How many members of the crew were there on the Steamer Orion?

A. Well right offhand, I think it is 31 men to the crew.

Q. And in October and November when you were sailing, and in December did the ship operate around the clock seven days a week?

A. Yes, sir.

Q. Did you stand watches?

The Court: I have two questions before he leaves the stand.

You said you got all the nuts off you were to get off except five or six. How many did you take off?

The Witness: I took off about twenty.

The Court: How many?

The Witness: Twenty-five.

The Court: Twenty-five?

The Witness: Yes, sir.

The Court: You said your toe nail was black when the wrench hit it. How long had the toe nail been black before the wrench hit it in the first place?

The Witness: The toe nail wasn't black until the wrench hit it.

: Direct examination of JOHN LOUIS HATT.

By Mr. Sampliner:

Q. What is your full name, please?

A. John Louis Hatt.

Q. Where do you live?

A. 48 Henry Street, Detroit.

Q. How old are you?

A. Sixty-three, at present. I will be 64 on the 25th of March.

Q. How many years have you sailed the Great Lakes?

A. Since 1910.

Q. Have you sailed steady?

A. Pretty much so.

[fol. 31] Q. And you have made sailing your trade, haven't you?

A. That's right.

Q. Now, what certificates are you documented with by the United States Coast Guard, United States Government?

A. Fireman, oiler, water tender.

Q. Do you also hold a lifeboat ticket?

A. Yes, sir.

Q. Recalling to you the vessel, the Steamer Orion, have you ever sailed on the Orion?

A. Yes, sir.

Q. And how long were you on the Steamer Orion?

A. Well, I should judge six months or better.

Q. What were you on the Orion, what job did you have?

A. Fireman.

Q. A fireman?

A. Yes, sir.

Q. Do you know Thomas Michalic?

A. I do.

Q. Was he your roommate?

A. He was.

Q. Recalling to you the latter part of 1955 and the beginning of 1956 was Michalic your roommate on board the Steamer Orion?

A. He was.

Q. Do you of your own knowledge know whether or not Michalic worked with the pumpman?

A. He did.

Mr. Ray: At what time?

Q. When did he work with the pumpman?

A. Well, he worked with the pumpman laying-up and fitting-out.

Mr. Ray: I object unless it relates to this 28th of December, 1955.

The Witness: How is that?

Mr. Ray: I say I object unless what you are talking about relates to December 28, 1955. Did you see him work with the pumpman on December 28, 1955?

Q. Do you understand the question, Mr. Hatt? He wants to know whether or not on the 28th day of December, 1955 [fol. 32] were you in the engineroom in the firehold?

A. I was in the firehold.

Q. Do you know as of that date whether he was helping the pumpman, do you recall?

A. He was working with the pumpman at that time.

Q. Now, Mr. Hatt, I want to know whether or not as his roommate did you have any opportunity to observe whether or not he bathed his left foot during the latter part of December, after December 28, 1955, did you ever observe him bathing his left foot?

A. Yes, sir.

Q. Can you tell us about it?

A. He used to come down there and stay in the room and bathe his foot in a bowl of water.

Q. You saw him?

A. I seen him.

Q. Did this man ever work with you in the firehold?

A. He was in the firehold, he was a fireman.

Q. Did you observe him working in the firehold?

A. Yes.

Q. Was he able to work?

A. He certainly was. He always did his work, left his boilers in good shape. I never seen him lagging on any of his work.

Q. Did you ever observe Michalic limping after December 28, 1955, did you ever see him limping?

A. Yes, he was limping around there before.

Mr. Sampliner: You may inquire.

Q. What did you say?

A. I said before.

Q. Before what?

Mr. Ray: I object to any further volunteering. He has answered the question.

I have no cross-examination.

[fol. 33]

Direct examination of EDSSEL WAISHKEY.

Q. Now, sir, recalling to you the Steamer Orion did you ever sail on the Steamer Orion?

A. Yes, sir.

Q. And how long did you put in on the Orion?

A. I was on there May and June of 1955 and January of 1956, and from March of '56 to May of '56—nine months, approximately nine months.

Q. Do you know a seaman or work with a seaman by the name of Thomas Michalic on Board that steamer?

A. Yes, sir.

Q. Do you know of your own knowledge whether or not Michalic worked with the pumpman in December or January?

A. Yes, sir.

Q. How do you know that?

A. Because at that time I was working in the engine room myself and I seen Mr. Michalic working with the pumpman, observed him.

Q. And what is the pumpman's name, do you know his name?

A. Hans Hanson.

Q. Did you have an opportunity to ever be in the pumproom?

A. Yes, sir.

Q. Can you tell us the occasions that you were in the pumproom, if you can recall?

A. Yes, we were filling the seacocks with the seacock filler.

Q. What is a seacock?

A. That's where you let your ballast water in or out for your tanks.

Q. Were the seacocks located in the pumproom?

A. Yes, sir.

Q. Now, towards the end of December did you have an occasion, that is of 1955, to work in the pumproom?

A. Yes.

Q. Can you tell us the conditions there?

A. Well, the pumproom wasn't too large, it wasn't a large pumproom, and the lighting wasn't too good. In fact we had to use an extension cord, and then we were taking out these feed pumps, all these cargo pumps.

[fol. 34] Q. Now, did you have an occasion after the 28th day of December, 1955 to observe Mr. Michalic as to whether or not he limped?

A. Yes, we were in watching the TV in the evening and I noticed him limping, and then I asked him—

The Court: Wait a minute. Conversation is out. Haven't you told this man that?

Q. Did you have an opportunity to observe him at work?

A. Yes.

Q. Did he work?

A. Oh, yes, he was a steady man.

The Court: Were you on board the vessel in the Spring of 1956?

The Witness: Yes, sir.

Q. Did you have occasion to observe whether or not in the Spring of 1956 this man limped?

A. Yes.

Q. Did he limp?

A. Yes, sir.

Direct examination of IRENE H. POWELL.

By Mr. Sampliner:

Q. What is your full name, please?

A. Irene H. Powell.

Q. Where do you live?

A. 951 West Sixth Street, Erie, Pennsylvania.

Q. For whom do you work?

A. General Electric Company.

Q. Is that General Electric in Erie, Pennsylvania?

A. That is in Erie, Pennsylvania.

Q. Do you know Thomas Michalic?

A. Yes, I do.

Q. Did Thomas Michalic live and board at your mother's and your home in Erie, Pennsylvania?

A. He did.

Q. And how long?

A. Oh, I would say off and on about two and a half years.
[fol. 35] Q. Now, recalling to you the month of January, 1956 at your home in Erie, Pennsylvania, do you recall whether Thomas Michalic returned to Erie, Pennsylvania during January of 1956?

A. Yes, he did.

Q. What did you observe about him?

A. Well, he had a limp then.

Q. Now, before he returned in January what did you observe about him before he came back?

Mr. Ray: I object unless the time is fixed.

Mr. Sampliner: All right.

Q. Recalling to you the month of September, 1955 and the early part of October, 1955, did you observe him before he went on board the vessel?

A. Oh, yes, I did.

Q. What did you observe about him?

A. He was all right then, he didn't have a limp or anything.

Mr. Ray: I object to all except the "he didn't have a limp".

The Court: Everything else goes out.

Q. Now, from January, 1956 to on or about March 15, 1956, prior to the time when he went back to the vessel did you have an occasion to observe him at your home?

A. Yes, I did.

Q. What did you observe about him during this period?

A. Well, he soaked his foot quite a bit.

Q. Did you have any particular place in the house where he would sit and soak his foot?

A. Well, he used it quite a bit in the living room so he could watch TV, try and get his mind off his pain.

Q. How many times did you observe him during that period soaking his foot?

A. Practically every day.

Q. Do you know of your own knowledge whether he went sailing during the Spring of 1956?

A. Yes, he did.

Q. How long was he gone? A. Only about just a couple of weeks.

[fol. 36] Q. After that did he return to your mother's and your home?

A. Yes.

Q. What did you then observe about him when he came back?

A. Why, his limp was bad by then and he had to use a cane.

Q. Did he soak his foot too when he came back?

A. Yes, he did.

Q. Do you know of your own knowledge whether or not he got any medical care after he came home, after April 1st?

A. Yes, in fact I went to the doctor with him, to Dr. Reister, and on two other occasions I called a cab for him to go down.

Q. Why did you take him to Dr. Reister?

A. Why, on account of his bleeding of the toe.

Q. Was there any condition in Erie at that particular time why you accompanied him?

A. Why, he was walking with his cane and he couldn't put his shoe on, the sidewalk was so icy, he asked me to go along with him to sort of help him, so I did.

Direct examination of HAROLD F. ISENBACH.

By Mr. Sampliner:

Q. What is your full name?

A. Harold F. Isenbach.

Q. Where do you live?

A. 5309 Edgewater Drive, Toledo.

Q. How old are you?

A. Thirty-nine.

Q. How many years have you sailed?

A. Nineteen.

Q. Where have you done all your sailing?

A. Majority of it on the Lakes.

Q. Now, in what capacity do you sail?

A. Well, in the past season I was First Mate and Captain on the Orion, in the entire '57s. In 1956 I was also Master and First Mate.

[fol. 37] Q. That is the Steamer Orion, the vessel in question?

A. Yes, sir.

Q. Now, you hold a certificate by the Government as Master or Captain, do you not?

A. Yes, sir.

Q. First of all, how long have you been in this service with the defendant, the Cleveland Tankers, Inc.?

A. Eight years.

Q. How many of those eight years were you on the Steamer Orion?

A. Five seasons.

Q. That would be five years?

A. Yes, sir, approximately that, within a couple of months.

Q. The Steamer Orion, when it navigates and is in port, about how many months do you work out of a year, approximately?

A. Approximately nine months.

Q. Now, as a Master of the vessel, what are the duties of a Master?

A. The Master is the agent of the company, in complete charge of the vessel.

Q. Now, how many issues did you have of your ticket, tell us about that.

A. Well, there is two issues of the Master's license and five licenses all together.

Q. When you say two issues, how many years is there between the issues?

A. Five years each issue. I just had it renewed a week or so ago.

Q. And the other four, what do you mean by that?

A. Well, every time you renew your license you raise your grade, you get a different issue to practice.

Q. You have your license?

A. Yes, sir, renewed in February or January.

Q. Now, Captain Isenbach, you were a Master of steam and motor vessels of what tonnage?

A. Any tonnage.

Q. And what waters?

A. Great Lakes.

Q. And what kind of a Pilot's license do you have?

Mr. Ray: I object to this kind of testimony unless he intends to qualify this man as an expert.

The Court: Sustained.

[fol. 38] Mr. Sampliner: I might qualify him as an expert.

The Court: I said sustained. He is a Captain. That's all the jury has to know.

Q. Now, in what other capacity have you served on board the SS Orion?

A. Well, at various times over this five-year period I was First, Second and Third Officer.

Q. What are the duties of the First Mate?

A. Well, the First Mate is in general charge of the work on the ship, more or less an overseer of the whole vessel, along with the Captain, under the direction and supervision of the Captain.

Q. Captain Isenbach, referring to the pumproom on the SS Orion, under whose jurisdiction is the pumpman, can you tell us something about that?

A. Well, the pumpman is connected with the engine department, but working directly under the supervision of the Mate, as far as instructions and duties to be done.

Q. Can you tell us whether or not you have knowledge of the pumproom on the Steamer Orion?

A. Oh, yes, sir, I broke in many pumpmen.

Q. Captain; what are the duties of the Second Mate?

A. Well on these tankers, most of the Mates' duties are approximately the same as far as navigation, piloting of the ship, unloading the cargo. I suppose the First Mate has charge of laying-up and the maintenance of the ship.

Q. What type of vessel is the Steamer Orion?

A. It is a steam tanker.

Q. Now, recalling to you the month of December, 1955, were you on board?

A. Yes, sir.

Q. And in what capacity at that time?

A. Second Officer, Second Mate.

Q. Captain would you be able to make a sketch on the blackboard of the pumproom?

A. Yes, sir, I think I could. (Witness goes to blackboard.)

[fol. 39] I can demonstrate where the location of the pumproom is. Well, first, I will start with a picture looking aft. As you come forward there are gratings, about three feet off the bottom. This is one grating, then on the after side

there was a ladder going up, and another upper grating. Then from there on there was another ladder that went on out to the main deck, this being the main deck.

Then we had these two main cargo pumps which were located in this location. Then on the forward side here there was a couple of other pumps. Then there were various pipes in between the pumps, and so forth.

Here is a side view of it, this being the pump you have reference to in this case. Then there was a cat-walk along through the middle, approximately two and a half or three feet wide, and on each side forward there was a pump.

The upper grating was about this level, and then this ladder ahead down here from the upper grating to reach this lower level. Then the other ladder was up here.

Would it be necessary to have a rear view?

Q. No, I believe that is sufficient. Could you stand back and point to it and explain to the jury, because you were facing the blackboard?

A. This is a view looking from forward to aft of this diagram.

Q. When you say forward to aft, you mean from the front of the vessel to the end of the vessel?

A. Yes. These are gratings. Here is a cat-walk across the ship. Here are the pumps, and the ladders out of the pumproom.

Q. When you refer to the other diagram would that be called athwartships?

A. Yes, athwartships, a side view. Coming in from the after end of the ship the ladder went down to this grating. This grating went all across the ship athwartships. Then the ladder went on down to this other grating.

Maybe a top view would help.

Q. Go ahead, draw it.

A. This is an open top grating on the top of the upper grating. That is much wider. This ladder came in five to [fol. 40] six feet. There is a ladder went on down to the bottom of the pumproom at the lower grating, which would be below this, and that is narrower.

Q. Can you tell us the dimensions of the pumproom?

A. Well, it was approximately 40 feet in width or beam.

Q. That means from what side of the ship to what side of the ship?

A. From here to here, from this distance here would be, looking at it athwartships, oh, around possibly 16 feet. It is a very peculiar structure. It has sort of tapering sides.

Q. During the month of December, 1955 did you have occasion to go into the pumproom?

A. Yes, sir, I did.

Q. Did you go in there very frequently?

A. Yes, quite often.

Mr. Ray: I object to testimony along this line unless Captain Isenbach was on the vessel on December 28, 1955.

The Court: Well, that might be brought out if he was or not. It has not been shown.

Mr. Sampliner: I will. May I have the exhibit of the accident report?

Q. Captain, referring to Exhibit 1, I am going to ask you whether or not you wrote that accident report up?

A. Yes, sir, I did.

Q. And who was with you at the time when you wrote that up?

A. The Master of the Orion, DeWitt King.

Q. How did you arrive at the date of December 28, 1955?

A. Well, it was merely an arbitrary date. It was kind of hard to reckon back at the time this was made up. This was made up on the 1st of April following. This may have been any time in December. It may have been the 21st, it may have been any time during that period.

Q. Did the Captain and you figure that out at that time?

A. Yes, sir.

[fol. 41] Q. Did you type that accident report up?

A. Yes, sir, I typed that accident report.

Q. Now, going to the question again, during the month of September, 1955 were you on board the Steamer Orion?

A. Yes, sir.

Q. Did you have occasion to go into this pumproom?

A. Yes, sir.

Mr. Ray: Same objection, unless he was on the vessel Orion at the time that it is claimed in this lawsuit this accident occurred. The date of December 28, 1955 is the date that the plaintiff himself gave, and it is only the physi-

cal situation that obtained on that date that is important at all in this lawsuit.

The Court: That is the date plaintiff gave. Were you on the vessel on that day, December 28?

The Witness: Not to my recollection, sir, but when we typed this up Mr. Michalic, the plaintiff, gave me that as the approximate date. He didn't really know exactly when it would have been.

The Court: You never knew until April that he made the claim.

The Witness: Yes, sir. Those are things that are usually made out at the time of the accident, but upon returning to the vessel it was my duty to make it out.

The Court: The date given here by the plaintiff himself is December 28 of that year.

The Witness: Yes, sir.

The Court: Now, do you know whether or not you were on the boat at that time?

The Witness: No, sir, I don't believe I would have been there on the boat at that time.

Q. Now, Captain, did you issue the hospital ticket to this man?

A. Yes, sir.

Q. Now, when the vessel would get into port, for instance down here at Whisky Island, where would they get [fol. 42] their lighting?

A. Well, they had an auxiliary direct current generator down there on the dock they would run to operate, hook it up to the ship's power.

Q. Now, do you remember in December when the vessel came in to Whisky Island?

A. Yes, sir.

Q. About when?

A. It was around the 20th.

Q. Were you on the vessel after that date?

A. Yes, sir, the following day, I am quite certain. the 21st or 22nd.

Q. Now, when the Captain and you wrote up this accident report was Michalic present with you?

A. Yes, sir, as far as I can remember on that I would say Michalic was there.

Q. And the Captain was there and you were the First Officer?

A. Yes.

Q. You typed that report up, which is Exhibit 1?

A. Yes, sir.

Q. Now, did you have any opportunity when the vessel came into port and during the month of December, around this date, the latter part of December, to inspect the pump-room or not?

A. Yes, sir.

Q. And why did you check it, do you remember?

A. Well, when you are coming into the mooring dock of that nature to prepare the ship for Spring navigation, why, you always gas-free the tanker, and I can well believe I was down there in the pumproom to see that it was gas-free at the time.

Q. Would you describe the conditions of your inspection?

The Court: As of what time?

Mr. Sampliner: The latter part of December when he was there.

Mr. Ray: I believe we are entitled to have the date fixed when this inspection was made.

The Court: You talk about gas-free. What do you mean, better tell the jury.

[fol. 43] The Witness: Gas-free is to render the ship non-explosive from gasoline.

The Court: Is that the only purpose for which you went down there?

The Witness: Possibly at that time, yes, sir.

The Court: Are you sure you went down?

The Witness: Oh, I undoubtedly would have gone down, absolutely.

The Court: Did you make any examination of any of the machines?

The Witness: Probably not at that time, but I had.

The Court: Did you have any reason to examine the machines or pump or anything else?

The Witness: No, not at that time.

The Court: Just checking for gas by your sense of smell?

The Witness: Yes, sir. Of course the chemist would come around and determine that afterwards, see if the ship was fit to do any work on it.

The Court: Go ahead.

Q. Now, Captain, can you describe the pumproom when you were in the pumproom in December?

A. Yes, sir.

Q. Can you describe the pumproom and tell us the condition of the pumproom?

Mr. Ray: I object.

The Court: Sustained. There wasn't any conditions we are concerned with here.

Q. Did you have occasion to examine the tools in the pumproom?

A. Yes, sir, I saw them laying around there.

Q. Can you tell us about the condition of the tools you had the opportunity to examine?

Mr. Ray: I object.

[fol. 44] The Court: Wait a minute, please. Yes, he should get down to the kind of tools we are concerned with here.

Q. Relative to the tools, were there certain tools in the pumproom?

A. Yes, sir.

Q. And have you worked with those tools?

A. Yes, sir.

Q. And can you describe the condition of those tools in December, 1955?

A. Well, they were in beaten and battered condition, as usual.

Q. Now, did you have an opportunity—wait a minute. When you say they are beaten and battered condition, can you describe them to the jury, please?

A. Well, none of the tools were very, you wouldn't call them new tools but they had been very beaten and battered, perhaps there for some time.

Q. What did the tools consist of?

A. Various wrenches, monkey wrenches and pliers and the wrenches had long iron bars, and things of that nature.

Q Did they have steel tools and bronze tools?

A Yes, sir.

Q Can you tell us why they have bronze tools there?

A Bronze tools are for non-striking.

Q You have worked with those tools in the pumproom?

A Yes, sir.

Q Now, going from the pumproom, can you tell us about the lighting conditions?

A Very poor.

Q Why—describe that.

A Well, whenever any of us go down there to do any work—

Q Use the pointer if you want to.

A Well, where most work was done in the pumproom would be down around this lower level here, around these pumps. Of course in the middle of the ship at any time, in this lower level, at all times it was necessary to use a flashlight in order to see anything in working on this grating level or below.

[fol. 45] Q Were there any portable lights there?

A No, sir.

Q What time are you talking about,—are you talking about in December?

Mr. Ray: I object unless it is December 28, 1955. This man should not be allowed to testify to general situations on other days.

The Witness: May I say something on this? We have come to the point where this is only an arbitrary date that I can recall, it may be any time.

The Court: Well, your argument isn't really proper, Captain, but the point is the plaintiff himself here has set up this date as December 28 as the day of injury in the testimony he gave to the jury. So the testimony is limited to that day and time, what went on there.

The Witness: Yes, sir, I can understand but in my explanation—

The Court: Let's not put anything in the record that should not be there.

The Witness: All right.

Q Captain, can you indicate on those pictures where the deadlights were or the portholes?

A. Yes, sir. Well, to the best of my recollection they were oh, perhaps about this level in the after bulkhead.

Q. When you say in the after bulkhead, were these port lights from the engineroom and firehold into the pumproom or did they go on the skin of the ship so lights could come through?

A. Well, they were in rather dirty condition. I don't imagine they had been cleaned since the ship's arrival.

Mr. Ray: I object. He was asked for the location of the portholes.

The Court: Yes, give the location, please.

[fol. 46] The Witness: Well, they were approximately, I would say, around the level of the cat-walk or just above, perhaps a foot above the cat-walk, in the after bulkhead, which would be this bulkhead.

Q. Those lights didn't shine outside?

A. No, sir.

Q. None of the portholes were on the outside skin of the ship?

A. No, sir. This is through the midship section here.

Q. You say you would have to use a flashlight. Can you tell us why in that area you had to use a flashlight in the pumproom?

A. No lights for proper lighting.

Q. Did you ever complain about it, Captain?

A. Well, it is a little hard to make a complaint.

Mr. Ray: I object.

The Court: Sustained.

Q. Now, the conditions that you have described in this pumproom, those were the conditions in the Steamer Orion in 1956?

A. Yes, sir.

Q. Were you Captain or Master of the Steamer in 1956?

A. Yes, sir.

Q. Were you Captain and Master of the vessel in 1957?

A. Yes, sir.

Q. You also served in other capacities such as First Mate, is that true?

A. Yes, sir.

Q. In 1957 that was the eighth year in the service of this defendant?

A. The eighth year, yes, sir.

Q. Captain, in your experience can you tell us whether or not a seaman on board a vessel has to obey orders?

A. Absolutely, any order that is given a seaman is supposed to carry it out the same as the Navy or a merchant vessel.

Q. Did you have as a member of the crew a certain Thomas F. Michalic?

A. Yes, sir.

[fol. 47] Q. In what capacity did he sail in 1955 and '56?

A. Fireman.

Q. If you can recall, when did he come on board the vessel in 1955 and tell us the circumstances, how he came aboard.

A. Well, I think it was approximately around the 15th of March. I had known Mr. Michalic from another ship on the Cleveland Tankers, on the Meteor, where he had always been a good worker, and so forth.

Mr. Ray: I object to that as not responsive and move it be stricken.

The Court: Just answer the specific question.

Q. Where was the vessel at the time?

A. Erie, Pennsylvania.

Q. Where did you see Michalic?

A. Well, I was walking up one of the streets at Erie and I happened to run into Michalic.

Q. What did you do?

A. Well, the vessel was plagued with a shortage of men.

Mr. Ray: I object. The circumstances under which the plaintiff joined the vessel are entirely irrelevant.

The Court: Certainly it had nothing to do with the lawsuit we have here. Everybody says so, we all know that.

Q. Now, did you have an opportunity in October of 1955 to observe his physical condition?

A. He was in good healthy physical condition.

Mr. Ray: I object. This man is no physician. He can say what he observed, how he walked, what his appearance was.

The Court: It is an improper question.

[fol. 48] Q. Can you tell us how he walked, as you observed him walking in 1955 when he came on board the vessel?

A. He walked the same as anyone else, without any trouble at all.

Q. Did you notice him working?

A. Yes, sir.

Q. Did he work?

A. Oh, yes.

Q. Captain, were you apprised while you were on the Steamer Orion from October, 1955 until through December of 1955 as to whether or not this man had Buerger's Disease?

A. Yes, sir.

Q. Did you know that?

A. Yes, sir.

Q. Now in April of 1956 at the time that the Captain, Michalic and you, as First Officer made out the accident report, can you tell us whether or not you had an opportunity to observe him walking about on the ship?

A. Yes, sir, he was having considerable difficulty walking. In fact he had the top of one of his shoes removed and cut out.

Q. Did you examine his left foot?

A. Yes, sir.

Q. Tell us what you observed.

A. Well, it was in a very swollen and festered condition, definitely.

Q. Did you give him any advice, or anything done there?

A. Well, I gave him a hospital ticket, and advised him to go to the Marine Hospital with it. He had gone too far, it was getting worse all the time.

Q. Did he leave the vessel?

A. Yes, sir.

Cross examination of Harold F. Isenbach.

By Mr. Ray:

Q. Who is Captain Johansen?

A. He is President of the Cleveland Tankers.

Q. Tell the jury whether or not on November 5, 1957 you were discharged from the employ of Cleveland Tankers by Captain Johansen?

A. Because of the unseaworthiness of the vessel.

[fol. 49] Q. Will you answer the question?

A. Yes, sir, because of the unseaworthiness of this vessel.

Mr. Ray: I move the last remark be stricken.

The Court: I asked you a while ago before I knew you had been discharged, to please, when a question is asked answer the question and don't make voluntary declarations.

The Witness: All right.

The Court: Now, you have done it a little too much. I must instruct the jury to disregard what was added after the question was answered.

The Witness: Well, your Honor—

The Court: Wait a minute. Please let's have no more excuses. You are just a witness. We all have to act in accordance with the rules. Sometimes it is hard to get witnesses and lawyers to act according to the rules, but we must. You must answer the questions. The other side always has the right to ask more questions if the other side wants to. Please let it go at that.

Q. Going back to 1955, Captain, you left that vessel on December 19th, 1955 with the rest of the forward end crew, didn't you?

A. Well, if you say the date, I can check it here for you. I will check it (looks at record). Correct.

Q. So you have no knowledge of whatever condition obtained on that vessel on December 28, 1955, do you?

A. No, sir. I don't think I was near the ship on that date.

The Court: Now, wait a minute. That means that what you told us about going down and checking the gas and all

that could not have happened during the time you were talking about if you were off the vessel on the 19th.

[fol. 50] The Witness: I can't quite understand your question.

The Court: You told the jury about the things you did, about checking the tools in the pumproom, and those other answers given by you, either as of the date of December 28th when the man says he was hurt or thereabouts. Are you saying now you weren't on that boat after the 19th of December?

The Witness: Yes, sir.

**MOTION TO STRIKE AND ORDER STRIKING PORTIONS
OF TESTIMONY OF HAROLD F. ISENBACH**

Mr. Ray: I move that the witness's testimony be stricken.

The Court: Ladies and gentlemen, everything this man said about what he had seen on or about that day in his previous testimony, all of which relating to December 28 when this plaintiff was hurt, and the date immediately around there, has to go out. He went off the ship December 19th and knows from his own discharge book he had no business talking about or mentioning it, and no business asking any questions about it if he wasn't there. Go ahead.

Mr. Ray: No further questions.

Mr. Sampliner: That's all.

The plaintiff rests.

**DEFENDANT'S MOTION FOR DIRECTED VERDICT
AND ORDER THEREON**

Mr. Ray: May it please the Court, the defendant at this time moves your Honor for a directed verdict in its favor on the ground that there is not sufficient proof of negligence of the Steamer Orion on the date in question as the proximate cause of the injuries that the plaintiff claims to have sustained.

In that connection I would like to advert first to the alleged negligence involving the lighting and the closeness of the space. I think the significant admission made by the plaintiff himself that he was able to remove 16 of the 20

nuts from the pump in question is a complete answer to the charge that the lighting was insufficient and that the space was too confining.

[fol. 51] Now, with respect to the tools themselves, the defendant relies upon the simple tool doctrine which, as the Court knows, simply stated, means that in connection with simple tools, of which the wrench in question was unquestionably one, the Master or the vessel owner and the defendant in this case was not obligated to inspect a tool of that type to see whether it was safe and suitable. And that is based upon the doctrine that as to such simple tools the opportunity of the employee himself is much greater.

There is no indication in this case that any defects that did exist, if they did exist, were brought to the attention of the defendant so that steps could be taken to have those tools replaced. For those reasons defendant requests a verdict in its favor on those facts be directed.

Mr. Sampliner: If your Honor please, in the case of Jacob vs. New York City, 315 U. S., 752, decided in 1942, we have a case on all fours.

I am going to ask the court reporter to read from his notes relative to the complaint made by Mr. Michalic.

(Reporter thereupon read from Page 10 of the record as follows:

"A. I told him, I said, 'This tool is not very good, kind of beat up. It's very cold down here.' I said, 'This wrench keeps slipping off.' He said, 'Never mind about that,' he said, 'Do the job as best you can.'")

Mr. Sampliner: In the case of Jacob vs. New York City, the Court said, Page 752, "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed, by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a suit slipped under the torque applied to it."

I quote further from the decision:

"Petitioner inspected the wrench, found it defective and then asked three times for a new one. This satisfied the burden of inspection placed on his shoulders by the doctrine, and it was then for the jury to say whether respondent's failure to comply with those repeated requests was negligence on its part. To deny petitioner the right to have the jury pass on that issue because of the simple tool doctrine is to say that doctrine relieves the master of any duty to furnish reasonably safe and suitable simple tools in spite of the fact that he knows they are defective, and requires the servant not only to inspect simple tools for defects, but also to supply his own simple tools when he finds those of the master defective. This is so obvious a perversion of the Jones Act as to require no comment."

In this particular case—and that is the reason I had the court reporter read—where the seaman, such as Michalic, complained to the pumpman, as to the condition of the tool, the complaint here that he made is the same, practically speaking for purpose of comparison, as in the Jacob case, and in the Jacob case the Supreme Court said it had to go to the jury.

Now, your Honor, may I say there has been a recent pronouncement, I put it in my trial memorandum, the second page, I would like to read.

"This case is brought under the Jones Act and the very recent case of *Livanos vs. National Bulk Carriers, Inc.*, 2d Circuit, decided October 24, 1957, states: 'Under this statute the test of a jury case is simply [fol. 53] whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought', citing: *Rogers vs. Missouri Pacific Railroad Co.*, 352 U. S. 500, 506, and *Ferguson vs. Moore-McCormack Lines*, 352 U. S. 521-523.

Now, if your Honor please, as far as lighting conditions are concerned, that is strictly a jury question in my estimation, because the evidence has been given not only by Michael but also the other witnesses. I don't recall each bit of testimony from the other witnesses, but Michael stated the condition and up to the present time it is uncontroverted. Consequently, basing my argument still on United States Supreme Court decisions, I contend this case has to go to the jury.

Mr. Ray: May I just briefly answer. I want to advert to the Jacob case and then I will conclude my argument. Inasmuch as Mr. Sampliner is relying upon Jacob vs. New York City, I would direct the Court's attention to the language on page 757: "For the only possible basis for the doctrine which is compatible with the provisions and policy of the Jones Act is that the Master is not negligent in the case of defective simple tools because the possibility of injury from such tools is so slight as to impose no duty on him to see that they are free from defects in the first instance or to inspect them thereafter." The Court then cites Newbern vs. Great Atlantic & Pacific Tea Co., 68 Fed. 2d 523, and Hedicke vs. Highland Springs Co., 185 Minn. 79, 239 N. W. 896—

"Or to put it another way, the master is relieved of the duty to inspect simple tools for defects because the servant's opportunity for ascertaining such defects is equal to or greater than the master's."

In that case there was a request by the individual using the tool on three separate occasions to get a new wrench. [fol. 54] The Chief Engineer said he had ordered a wrench, and this accident occurred to Jacob before the new wrench arrived.

Now, as I analyze the holding of the Supreme Court, I think it is right that they left unchanged and still the law of the doctrine in the Newbern vs. Great Atlantic & Pacific Tea Co. case, also the O'Hara vs. Brown Hoisting Machine Company in 171 Fed. 394. I think Jacob vs. New York is clearly distinguishable on the facts that are before us in this trial.

Mr. Sampliner: I would like to read from page 756:

"The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reason for and the scope of the simple tool doctrine"—that was the sentence before the sentence Mr. Ray read.

The Court: Well, gentlemen, I am going to require the defense to go forward here. But, first, let's talk a little about the Jacob case, because obviously the plaintiff is trying hard to get under it.

We start out here, it seems to me as the case goes along, it sort of degenerates into a discussion of everything but the main thing, and the main thing is negligence.

We start out here with a man whose left leg is numb in 1949, he had to stop when he was walking. You heard the doctors describe what is causing that. So, seven years before he is hurt he has Buerger's Disease and he hits the same big toe with a brick in '52, after having had a sympathectomy in 1951 to disconnect the nerves so he wouldn't feel it so much. So he is very conscious of his condition. As I understood, he really stopped smoking February 3rd of this year when some doctor told him he should not do that, some doctor who told him he was his own worst enemy.

Now, the lawsuit degenerated into a lot of evidence about Buerger's Disease and everything that went with it. [fol. 55] Some of the testimony seems to indicate that if this man had stopped smoking in '51, as he should have done, it would not have progressed. Dr. Bright told about the 150 or 175 cases he had treated who quit smoking and got along all right, but 15 percent of those who kept on smoking had to lose a foot. He quoted Dr. Silberg, who seems to be the top man in that field as having 436 cases; and none of them had an amputation because all of them quit smoking. It is the testimony in this case this man hasn't quit smoking yet. He knows the danger. And there were two statements that were volunteered by plaintiff's doctor. I say "volunteered" because no one asked him. He made quite a habit of volunteering in this case. In one statement he said "It is awful hard to give up smoking." Then he went on in the next minute after giving a medical opinion, to expound a theory that had nothing to do with the lawsuit, that "many

of the people who get lung cancer and smoke, just couldn't help it."

Now, then, we have a petition here and the petition is the foundation of the claim, and no one has yet talked about the petition. No one has yet talked about the difference between the petition and the proof. Here is what the petition says about the wrench that is supposed to have hit him on the foot, which would be a jury question to say whether it did or not, because, knowing he had Buerger's Disease, he certainly knew how dangerous it was, knowing any blow would start an aggravation of that condition, one would almost come to a quick conclusion, if it fell on his foot he would run and tell somebody in the next ten minutes or hour and not wait for a month.

Getting back to the petition it states he was "using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective."

I haven't heard anything about the teeth or grip. All that I heard is what amounts to descriptive adjectives, in [fol. 56] conclusion, that it was "an old beat-up wrench", "the wrench was all chewed up", "the tool wasn't good", "the wrench slipped off". And the quotation just given me was read by the reporter "this tool is not very good, kind of beat-up". "This wrench keeps slipping off."

Now, let's have some basis in this case for the Circuit Court of Appeals. They will be trying to find out whether or not plaintiff proved it was a defective wrench. Does he prove it by saying it is an old beat-up wrench?

Let's get into the Jacob case and see what proof they had there. One of the plaintiff's duties there was to change oil strainers, and this was done about three times a week, and required the removal and replacement of a manifold head, housing the strainers, which was held in place by six studs and nuts. When the manifold was replaced, the nuts had to be very tight. The best tool to remove and tighten the nuts was a straight-end wrench fitting a 1 1/4" nut. Petitioner used an S-shaped end wrench of the proper size which was "well worn", "had seen a lot of service," was "a loose fit" and "had a lot of play in it." There was about 1/16 of an inch "play" in the jaws; it was worn.

The wrench was about 18 inches long and the "play" at the end was "about an inch."

There is a description of a wrench, and any court that sees that, and the Supreme Court wrote it, can practically see the wrench. Further along a little more description, page 755: "There was about $\frac{5}{8}$ of an inch of thread on the studs, and petitioner had changed the wrench on one nut four times. As he started the fifth tightening, the wrench slipped, causing him to fall from the 18-inch square platform on which he was standing to the cat walk 18 inches below."

Now, what did the case turn on? The Court went on to say it was a close case. It wound up with a pretty close court. Justices Murphy, Frankfurter and Jackson concurred in the result. I should not have said it that way. [fol. 57] Justice Murphy wrote the opinion and Justices Frankfurter and Jackson concurred. So three on that side and three on the opposite side. "The Chief Justice, Mr. Justice Roberts, and Mr. Justice Reed are of opinion that the judgment below should be affirmed." So, three to three on the case and they called it close.

What did they rule? Here you have a man who was supposed to do a little job three times a week. He asked the chief engineer for a new wrench three times. Three weeks elapsed between the time he made the first request and the time he was hurt. Two days before he was hurt he had again asked for another wrench, and the Court said that inasmuch as this boat was just going back and forth across the river, touching shore each time, there was opportunity to the point where the jury had the right to take the case; there was opportunity to have gotten the wrench, and it was up to the jury to decide whether or not there was negligence existed in the failure to get one over that three weeks period. So I don't see where the Jacob case applies here.

But I think we are in a position here where we should ask the defendant to go forward to clear up a few things which have been mentioned here. We have a ship captain, who, if he had a complaint, should have made it to the Coast Guard. I want the jury to get the whole story, so let's go ahead.

Before that I should tell you one other thing: this business of lights—that was taken care of by plaintiff having said he had no difficulty in seeing the bolts. And I wanted to let you know now the lights are out.

[fol. 58]

Defendant's Testimony.

Direct examination of LEON McCANDLESS.

By Mr. Ray:

Q. What is your name, please?

A. Leo McCandless.

Q. Where do you live?

A. Golconda, Illinois.

Q. Do you have a street address there?

A. No, sir.

Q. Is that in the southern part of Illinois?

A. Yes, sir.

Q. What is your occupation, Mr. McCandless?

A. Marine engineer.

Q. How long have you been a marine engineer?

A. About 18 years.

Q. What license do you hold?

A. Hold a Chief Engineer's now.

Q. By whom are you now employed?

A. Cleveland Tankers.

Q. And does Cleveland Tankers own and operate the Steamer Orion?

A. Yes, sir.

Q. On December 28, 1955 were you employed on that vessel?

A. Yes, sir.

Q. What capacity?

A. First Assistant.

Q. Was the vessel laying up for the navigation season of 1955 at that time?

A. Yes, sir, it was laying up.

Q. On the morning of December 28, 1955 what, if any, orders did you give that had to do with work to be done in the pumproom on that vessel?

A. Well, I told the pumpman to raise the casing on the centrifugal pump and check the moving parts.

Q. How often is that type of work done during the year?

A. Done once a year.

Q. They would take it off at lay-up and put it back on fit-up?

A. In fit-up.

[fol. 59] Q. Did you tell the pumpman he would have any assistance in doing the work?

A. Yes, I told him I would send a man to help him.

Q. Did you send a man to help him?

A. Yes, I sent Mr. Michalic to help him.

Q. Did you examine the pumproom at the time that work was going on?

A. I was in and out of there at times.

Q. Did you actually see the men working?

A. No, I could not.

Q. You have no recollection of those details?

A. No, I don't.

(Thereupon photographs marked Defendant's Exhibits A, B and C.)

Mr. Sampliner: If the Court please, may we have a minute to look at the pictures, before objecting or allowing these to go into evidence?

The Court: Surely.

Mr. Sampliner: Thank you.

No objection to these pictures.

Q. Will you describe generally the location of the pumps in the pumproom of the Steamer Orion as they were on December 28, 1958?

A. Yes, there are five pumps in the pumproom, on the after side of the pumproom. There is two centrifugal pump on the port and starboard side.

Q. Perhaps you can come down to this drawing made by Mr. Sampliner and point out to the jury where these are, using this area as the pumproom. This area right here is the pumproom, and can you point out to the jury where the various pumps were located?

A. Well, there would be one centrifugal pump here, the other centrifugal pump would be here, reciprocating pump

here, and one here, a bilge pump in between two centrifugal pumps (indicating).

[fol. 60] Q. Which pumps were the ones the casings to be removed from under your orders?

A. The two centrifugal pumps.

Q. Point out where they are.

A. The ones here and here.

Q. Is there a cat-walk goes athwartships in the pump-room?

A. Yes, sir.

Q. What are the approximate distances away that those pumps you are talking about are from that cat-walk?

A. Well, the cat-walk from the casing that was taken off was about ten inches head of it and 16 inches above it.

Q. That is true with respect to both pumps?

A. Both pumps are the same.

Q. I show you what has been marked for identification as Defendant's Exhibit A, and ask you to look at it and explain to the jury what it is.

A. Yes, that is the starboard side of the pumproom showing the centrifugal pump and the piping around it.

Q. Does it show the casing? A. Yes, it shows the casing raised just from the pump.

Q. Is that or not a fair representation of what it purports to portray in the pumproom of that vessel as on December 28, 1955?

A. Yes, it would be about the same.

Q. I show you what has been marked for identification as Defendant's Exhibit B and ask you what that is.

A. That shows the centrifugal pump with the casing raised to show the upper casing and lower casing to show the moving parts.

Q. Is the cat-walk in that picture?

A. Yes, it shows the engine cat-walk.

Q. What is the situation whether that is or is not an accurate portrayal of that pump in the condition it was on December 28, 1955—I am talking about the general description, not the exact way it was, but is that a fairly accurate description of the pump and its relationship to the cat-walk and pipes as of that day?

A. Yes.

[fol. 61] Q. I will show you Defendant's Exhibit C and ask you to identify that.

A. This is the centrifugal pump with the casing raised and shows the cat-walk and the piping around the pump.

Q. What is the situation as to whether that is an accurate and fair portrayal of the area it portrays as of December 28, 1955?

A. Yes.

Mr. Ray: I offer these three exhibits in evidence.

Mr. Sampliner: No objection.

The Court: They may be received.

Q. Now, Mr. McCandless, holding the exhibit up like that, I am now referring to Exhibit A; will you kindly point out to the jury where the pump is and where the pump casing is?

A. The pump is right here and the casing is raised above it, hanging up on chain falls above the pump.

Q. I will ask you to refer to Defendant's Exhibit C and to point to the jury where the pump is and also where the pump casing is and where the bolts are on the pump itself.

A. Well, here is the pump, the lower part of the pump, the moving part, and here is the casing hanging up above it, and the studs up in the lower half of the casing that are on the pump now.

Q. And Defendant's Exhibit B is a close-up of the star-board turbine pump, is that right, reciprocating pump?

A. No, that is a centrifugal pump.

Q. Centrifugal pump?

A. Yes, sir.

Q. With the casing lifted?

A. Lifted.

Q. Showing the bolts and showing the holes in the casing and showing the cat-walk?

A. That's right.

Q. Now, how many bolts are there on that pump that the casing fits on, do you recall? Have you ever counted them?

A. No, there are approximately twenty, I would say.

[fol. 62] Q. How long did the lay-up work continue during 1955 and into 1956?

A. We were finished January 6.

Q. And during that period of time did Mr. Michalic tell you that he had sustained any injury or any accident of any kind?

A. No, he didn't.

Q. Did he at some later date tell you he had received an injury?

A. Yes, after he came back to work and just before he got off in the Spring.

Q. Did you observe him during the period from the 28th of December until the 6th of January as to whether he was performing his duties or not?

A. Yes, he was performing his duties.

Q. Where was the vessel when you rejoined it?

A. It was at Cleveland, tied up at Allied Oil Dock.

Q. How long did you work in fit-out during the Spring of '56?

A. It would be approximately three weeks.

Q. And was Mr. Michalic a member of the crew of the vessel at that time?

A. Yes, he was.

Q. And did he perform his duties?

A. Yes, he worked.

Q. What did you work, eight-hour days at that time?

A. Yes, sir.

Q. What type of work did Mr. Michalic do?

A. Well, the general working on boilers and pumps. The work had to be done and put back together.

Q. And he left the vessel on April 1st, is that correct?

A. I don't remember the date.

Q. But anyway it was some time subsequent to the time the vessel got under way there navigating?

A. Yes.

Q. Now, what is the situation with respect to the tools in the pumproom, what type of tools did you have in the pumproom on December 28, 1955, just generally speaking what kind of tools?

A. Well, they are special alloy tools, non-sparking, and they are only used in the pumproom.

Q. What did they consist of?

A. Well, they consisted of different size wrenches, and hammers and scrapers, and different things we would need in taking a pump apart.

[fol. 63] Q. What is the situation with respect to the removing of the nuts on the flange or pumphead, do you or do you not have a specific type of wrench that is used for that purpose?

A. That's right, we have an open-end wrench of certain size to fit the nuts on that pump.

Q. And that tool is only used in the pumproom for that purpose, is that right?

A. That's right.

Q. Now, prior to December 28, 1955 had you individually made any inspection of the tools in the pumproom?

A. No, I hadn't.

Q. What is the situation as to what is done on that vessel to replace any tools that are worn?

A. Well, usually in October of the year before we lay up the Chief goes down—

Mr. Sampliner: I object.

The Court: He may answer what is done.

A. (Continuing) He goes to the pumproom and checks over the tools to see if any worn or missing, so as to have the proper tools during the lay-up.

Q. Now, while Mr. Michalic and you were on the vessel either prior to December 28, 1955 or subsequent to that time did he tell you he had Buerger's Disease?

A. Yes, sir.

Q. Did you know what Buerger's Disease was?

A. No, sir.

Q. Did he have any difficulty performing his work?

A. Well, he got around and fired O.K.

Mr. Ray: You may cross-examine.

Cross examination of Leon McCandless.

By Mr. Sampliner:

Q. Would you mind going to the blackboard and drawing that open-end wrench for removing the bolts on that pump, and give us a complete description of it?

[fol. 64] Mr. Ray: If you can.

A. Which wrench is this, now?

Q. You just testified there is a special wrench used for the removing of the bolts of the starboard centrifugal pump, is that right?

A. There is one wrench in the pumproom that is used for that, yes, an open end wrench.

Q. Would you kindly draw that?

A. (Witness draws open-end wrench.)

Q. What is the length of the wrench?

A. The exact length I couldn't say; it is around ten or eleven inches, approximately.

Q. What is the weight?

A. It weighs two or two and a half pounds.

Q. And is this the claw part of it, what is the measurement of the claw part?

A. It is marked to $1\frac{5}{8}$ inch nut.

Q. And when you refer to that, pointing to your diagram, this would be the claw?

A. Yes, that is the opening that fits the nut.

Q. You say the measurement is what?

A. Marked for $1\frac{5}{8}$ inch nut.

Q. Now, what type of metal is this tool made of?

A. That I wouldn't know. It is an alloy, special made tool for pumproom work.

Q. Recalling to you December, 1955, did you have an opportunity to examine that tool?

A. I did not examine it.

Q. Therefore you do not know the condition of that tool, do you?

A. No.

Q. Now, how long have you been in the employ of the Cleveland Tankers?

A. Seven years.

Q. Are you now Chief Engineer?

A. Yes, sir.

Q. What vessel?

A. Mercury.

Q. Do you expect to go back to the Mercury this coming season?

A. Yes, sir.

[fol. 65] Q. Now, in December, 1955, you were on board the vessel?

A. Yes.

Q. Now before we leave the board here, can you tell us whether or not there were any teeth in here or whether it was blunt here?

A. An open-end wrench is smooth, there is no teeth inside of an open-end wrench, the jaws of the wrench.

Q. Would you be able to tell us the last time you saw that wrench prior to December, 1955?

A. No, I would not.

Q. Tell us the exact words you used when you gave the order to Michalic to accompany the pumpman into the pumproom.

A. I don't think I could say the exact words.

Q. Well, approximately, did you give an order?

A. Well, I told him to go in and assist the pumpman in the pumproom.

Q. And was the pumpman present at the time you gave the order?

A. Don't remember.

Q. Now, where was this order given to Michalic?

A. I don't remember.

Q. But you did give the order?

A. Yes.

Q. And, Chief, in order to get into the pumproom does the man have to leave the engine room and firehold to go outside on deck to get into the pumproom?

A. That's right.

Q. Now, was this order given on or about the 28th day of December, 1955, to the best of your recollection?

A. Yes, I would say it was.

Q. Did you tell Mr. Michalic what type of work he was going to do with the pumpman?

A. He was going to assist the pumpman to take the pump apart.

Q. What was the capacity of Michalic on board the Steamer Orion?

A. He was a fireman.

Q. And the duties that you were going to send him to perform, was that work to be done by a fireman?

A. During lay-up the fireman does work on pumps, also, as well as in the pumproom.

[fol. 66] Q. That is not his customary work?

A. During lay-up, yes.

Q. As fireman he handles the propulsion machine, doesn't he?

A. No, he handles the boilers, fires the boilers during the running season.

Q. What does he do during the fit-out, what does he do during that?

A. He works on the boilers and the pumps and the valves.

Q. In other words, in getting the vessel ready for navigation he follows your orders, doesn't he?

A. That's right.

Q. All of this work is done under peremptory orders, isn't it?

A. Yes, sir.

Q. Michalic told you about this accident he had, didn't he?

A. Before he got off in the Spring.

Q. Was he a good workman?

A. He worked, yes.

Q. And prior to December 28, 1955 was he able to work and carry on his duties?

A. Yes, sir.

Q. Did you testify on direct examination that he apprized you of the fact he had Buerger's Disease?

A. Yes, sir.

Q. You permitted him to work?

A. I didn't know what Buerger's Disease was.

Q. Did you permit him to work after being apprized of that fact?

A. Yes, sir.

Q. Now, these studs or bolts, are they shown in the pictures here, referring to Defendant's Exhibits A, B and C?

A. One or two of them are shown.

Q. Would you be kind enough to show us?

A. This one here—they are just studs—right there (indicating).

Q. These are the studs?

A. Yes, those are studs.

Q. Will you point that out to the jury? You are referring to what exhibit?

A. That is B. Those studs there, right here. You can see them on the casing.

Q. How do they remove those studs?

A. They do not remove the studs.

Q. How did they remove the bolts that fasten on to the studs?

A. They remove the nuts off of them.

[fol. 67] Q. How do they do that?

A. They take a wrench, loosen them up and unscrew them.

Q. Don't they have a mallet to remove the nuts?

A. To loosen the nut, yes.

Q. What do they do that for?

A. To pull the casing down tight together, so it won't leak when it's used as a pump.

Q. This particular pump is a piece of machinery used for what purpose?

A. For pumping cargo.

Q. What do you mean by pumping cargo?

A. Pumping out the cargo we carry, gas and oil.

Q. Have you ever counted the number of studs and nuts on this centrifugal pump on Defendant's Exhibit B?

A. No, I haven't.

Q. Why did you say there were only twenty?

A. I didn't say. I said approximately twenty.

Q. There might be thirty?

A. There might be more than twenty or less.

Q. Referring to this picture, is that the starboard centrifugal pump in Defendant's Exhibit B?

A. Yes, sir.

Q. Now, can you tell us where the lights are with reference to this starboard centrifugal turbine pump in the pumproom?

A. There are two lights on the overhead.

Q. How far away from this piece of machinery, this starboard turbine pump?

A. The height I can't give you.

Q. How high is it from the deck where this is located to the roof or to the top of the pumproom?

A. I wouldn't know.

Q. Would it be higher than this ceiling here?

A. Yes.

Q. Would it be twice as high as this here?

A. I wouldn't say it was, no.

Q. Would you say one and a half?

A. Approximately.

Q. What was the kind of light bulb they had, can you give us the voltage?

A. No. In fact they are inclosed lights, gas-proof.

[fol. 68] Q. Gas-proof, that means they are hermetically sealed up against the bulkhead?

A. Yes.

Q. Tell us the type of bulb used there.

A. The regular light bulb.

Q. Of 100 or 150?

A. 100, I would say.

Q. It would be that distance, one and a half as high as this Court Room is?

A. Yes.

Q. There are two of them?

A. Two are in the ceiling.

Q. Where in the top of the pump room, starboard and port?

A. Starboard and port sides.

Q. Isn't it true when you went down there you had to use a flashlight to do a lot of work near the cat-walk?

A. No, sir, because there was three portholes in the after bulkhead that had 150 light bulbs behind them to throw light into the pump room.

Q. What was the condition of the dead-lights on December 28, 1955?

A. I can't say.

Q. Would you say they were dirty?

A. I wouldn't say.

Q. You wouldn't say they were or were not?

A. No.

Q. If they were dirty would the electric light reflect through the dirty pane of glass?

A. The light reflected through there.

Q. You don't know what the condition was on December 28, so you don't know?

A. They wasn't that dirty They couldn't see through.

Q. Please answer the question. You don't know, do you?

A. On that date I don't remember if I was in there or not, but they always had—

Q. Please answer my question. You don't know, do you, on that date?

A. No.

Q. Now, Chief, why did they use a portable light if there was sufficient light—that would be the extension cord—why was an extension cord used there?

A. To give more light.

[fol. 69] Q. Wasn't it because of the intricate work of getting in under the cat-walk and around the cat-walk down near the bow of the vessel here?

A. I didn't get under the cat-walk.

Q. At or near the cat-walk. In other words, to remove these casings you have to get down on the deck that is below the cat-walk?

A. It is alongside of the cat-walk.

Q. Can you tell us, Chief, using this picture here, as to the dimensions from bulkhead to bulkhead, as far as the pumproom is concerned?

A. You mean forward and aft or athwartships?

Q. Fore and aft.

A. Fore and aft, approximately ten feet.

Q. That means it is ten feet, which would be about from where I am standing over to the edge where that jury box starts, isn't that true—am I about ten feet from that?

A. Back a little farther.

Q. Would that be about ten feet (indicating)?

A. Yes.

Q. And this machinery you have described, as in Defendant's Exhibit A, is that in that areaway of ten feet where I am from here to the beginning of the jury box?

A. Yes, sir.

Q. This Defendant's Exhibit A reflects the type of machinery in there, is that right?

A. No, sir.

Q. What do you mean by that—is there more machinery than what we are seeing here?

A. Yes, sir, there is another pump there.

Q. There is more machinery. So, therefore, the more

machinery would be on the port side of the vessel, in addition to this machinery as described in Defendant's Exhibit A?

A. That's right.

Q. Going to Defendant's Exhibit C, is this a true representation, although taken February 24, 1958, is that a true representation of the bulkhead fore and the bulkhead back here aft, which I can see a portion of?

A. That is the bulkhead, but you have them mixed up. This is aft and that is forward.

[fol. 70] Q. Therefore, forward is here where my right hand is, and this would be aft (indicating)?

A. Yes.

Q. Now, then, Chief, these are rails here on the cat-walk, aren't they?

A. That's right.

Q. Now, when Michalic had to remove the nuts off the studs here, as far as this casing is concerned on this starboard pump, he had to go off the cat-walk and get down below the cat-walk; in other words, his feet were on a lower level than the cat-walk, isn't that true?

A. Yes.

Q. And that is in Defendant's Exhibit C—right?

A. Yes.

Q. Were you in the pumproom on December 28, 1955?

A. I don't remember.

Q. Do you know where the position of the extension light was on that particular day?

A. No, sir.

Q. Did you ever use a flashlight in the pumproom?

A. To work?

Q. Yes.

A. No, sir.

Q. Did you ever use one?

A. No, sir.

Q. Are you sure?

A. Yes, sir.

Q. Did you ever use the flashlight while in the service of that steamer?

Mr. Ray: I object.

The Court: We are not concerned with anything but this pumproom.

Q. Were you on board the vessel in October, 1955?

A. Yes, sir.

Q. In what capacity?

A. First Assistant.

Q. Do you remember the occasion when Michalic came on board and entered the service of the SS Orion at Erie, Pennsylvania?

A. I was aboard then, yes.

Q. Can you tell us from your personal observation how he walked when he came on board the vessel?

A. I don't remember him coming aboard at that time.

[fol. 71] Q. Can you tell us when he first came aboard the vessel in October if you ever watched him walking around the ship?

A. Yes, sir.

Q. How did he walk?

A. He walked with a slight limp.

Q. You mean when he first came on board that boat?

A. Yes, sir.

Q. In October of '55?

A. In October.

Q. In December of '55 did he have the same limp?

A. Yes, sir.

Q. Did he have a more pronounced limp after his accident?

A. I wouldn't say he did.

Q. When he left the vessel on April 1st, 1956, can you tell us about his limp?

A. I couldn't say it was much worse.

Q. Do you know whether or not he had his shoe cut out?

A. I don't remember that he did.

Q. Did you examine and see that his toe was festering?

A. No, sir.

Direct examination of HANS HANSEN.

By Mr. Ray:

Q. What is your full name?

A. Hans Hansen.

Q. Where do you live?

A. Gary, Indiana.

Q. What is your street address?

A. 958 Lane Street.

Q. By whom are you employed?

A. Cleveland Tankers.

Q. How long have you been employed by Cleveland Tankers?

A. Oh, about twelve years.

Q. What certificates do you have issued by the United States Coast Guard?

A. A. B., as a pumpman.

Q. An able-bodied seaman, is that right?

A. That's right.

Q. How long have you had that certificate?

A. The certificate I only had about over a year but I have been pumping there for about eight years.

[fol. 72] Q. On various vessels owned by Cleveland Tankers?

A. Just on the Orion.

Q. Were you pumpman on the Orion on December 28, 1955?

A. Yes, sir.

Q. With particular reference to that day did you or did you not receive any order from the First Assistant Engineer as to any work to be done in the pumproom and involving the pumps?

A. Well, I had orders to take the casings off the two main pumps in the pumproom.

Q. Take the cases—

A. The casings.

Q. They are the two main pumps?

A. Yes.

Q. Are they the centrifugal pumps?

A. The two centrifugal pumps.

Q. Now, were you advised at that time as to whether you would have any help doing that work?

A. I was advised I would get some help down there.

Q. Well, did you get some help?

A. Yes, sir.

Q. Who came into the pumproom to help you?

A. Tom. I don't know his last name.

Q. Michalic?

A. That's right.

Q. When did you begin that work on the morning of December 28?

A. About 8:00 o'clock in the morning.

Q. Would you describe in as much detail as you can remember what you and Mr. Michalic did after you went into the pumproom with respect to removing the casings from the pumps?

A. I gave him a hammer and a wrench there, a 15/8 wrench to take the nuts off the casing.

Q. And did you or did you not show him how to take the nuts off?

A. No, I didn't show him how.

Q. You just handed him the wrench and the mallet?

A. That's right.

Q. Can you describe the wrench, what type wrench it was?

A. Just an open-end wrench.

Q. Approximately how long was it?

A. I would say about twelve inches.

[fol. 73] Q. Do you have any idea how much it weighed?

A. About two pounds, 2 1/2 pounds.

Q. What material was the wrench made of?

A. Sparkproof alloy.

Q. What was the mallet made of?

A. Same thing.

Q. Also spark-proof alloy?

A. That's right.

Q. In what condition was that wrench you gave Michalic?

A. It was in a good condition.

Q. Did you notice any chipped or worn places on it?

A. No.

Q. What was the condition of the mallet?

A. Same thing, it was a good one.

Q. Did the two of you start to work on the same pump?

A. No, each worked on one pump. I worked on the other.

Q. Which pump did you work on?

A. He worked on the port pump and I worked on the starboard pump.

Q. How long did you remain in the pumproom on that morning doing the work you were doing?

A. I don't remember.

Q. During the time that you were there did you observe Mr. Michalic doing his work at all?

A. No.

Q. In other words, you went to your work and he went to his, is that right?

A. Yes.

Q. At any time while you were there did he complain to you about the condition of that wrench?

A. No, sir.

Q. Did you have any conversation with him at all about the wrench?

A. No.

Q. At any time while you and Michalic were working there did you see that wrench drop out of his hand?

A. No.

Q. Did you hear it drop to the deck?

A. No.

Q. Now, how long did you remain on that vessel after December 28, 1955, during the lay-up?

A. I think around the 5th or 6th of January.

Q. Did Mr. Michalic remain on the vessel during that time also?

A. Yes.

[fol. 74] Q. Did he continue to do his work?

A. As far as I know he did.

Q. At any time during that period did he tell you he had dropped a wrench on his toe?

A. No, sir.

Q. Did he at any subsequent time tell you he had dropped the wrench?

A. He never mentioned anything to me about it.

Mr. Ray: You may cross-examine.

Cross examination of Hans Hansen.

By Mr. Sampliner:

Q. Are you going back to work for the Cleveland Tankers this coming year?

A. I expect so, yes, sir.

Q. You received an order from the First Assistant Engineer to take these nuts off the casings of the centrifugal pumps, is that right?

A. That's right.

Q. Where did you get this order?

A. Where did I get it?

Q. Where did he give it to you?

A. I got that up in the Mate's room before we went to work at 8:00 o'clock in the morning.

Q. Did you ask him for some help to do that work?

A. That's right.

Q. What did he say to you?

A. He said he would send a man over there, there would be a man over there at 8:00 o'clock.

Q. And did he order a man over there?

A. Yes.

Q. Was the man he ordered over there this man here (indicating plaintiff)?

A. That's the man.

Q. Do you remember what day of the week this was?

A. No, I couldn't.

Q. Do you remember the date, whether it was December 27, 28, 29th or any other date in December?

A. No.

Q. Where did you give him the hammer and wrench?

A. Down on the floor plate there where the pumps are.

[fol. 75] Q. Handing you Defendant's Exhibits A, B and C, please be kind enough to tell us in what portion of the pumproom you gave him the hammer or the mallet and the wrench?

Mr. Ray: I assume you mean where the two people were standing at the time he handed him the wrench and mallet?

Mr. Sampliner: Yes, sir.

A. What do you want me to do?

Q. Show us on that picture.

A. I would say I was right here (indicating).

Q. Hold it up. Where were you standing?

A. On the floor plate here.

Q. That is the cat-walk?

A. If you want to call it.

Q. Where was he?

A. He was right next to me.

Q. Was that near the starboard centrifugal pump?

A. This is the starboard pump here.

Q. And when he received this hammer and wrench what did you tell him to do?

A. Knock off them nuts around the casing there.

Q. Did you show him the nuts he had to knock off?

A. No, I told him the casing. There is only one pump there on that side, centrifugal pump.

Q. When that happened did he have to leave the cat-walk and get down to a lower level?

A. Yes, sir.

Q. Did you watch him work?

A. No, sir.

Q. Can you tell us where the lights were at that particular point?

A. Right here in this picture, right on top of this shaft here there is a light right in here.

Q. How far up?

A. I would say about a foot on top of that shaft.

Q. Where did that light come from?

A. Comes from the engineroom.

Q. That light has to penetrate through a dead-light, that is, a window?

A. Through a porthole.

[fol. 76] Q. How big is the porthole?

A. Oh, ten or twelve inches.

Q. How thick is the glass in the porthole?

A. I would say half an inch, maybe more, I couldn't tell you.

Q. What was the condition of this port-light, was it clean or dirty?

A. I couldn't tell you.

Q. When you gave him the hammer and the wrench did you stand there on the cat-walk and watch him carry out your orders?

A. No, sir.

Q. What did you do?

A. I went over to the pump to work, to the other pump.

Q. How long did you work on the other pump?

A. I would say approximately an hour.

Q. Did you go forward to shut off a valve, did you leave the pumproom?

A. I left the pumproom. I don't know anything about a valve.

Q. Why did you leave the pumproom?

A. To go and get the chain fall to lift the casing up.

Q. How long were you away from the pumproom?

A. I couldn't tell you exactly.

Q. Would it be two hours?

A. No.

Q. Would it be an hour?

A. It might be a half an hour.

Q. When you came back was he still working on the casing?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Was he there when you came back?

A. I guess so.

Mr. Sampliner: I object to the word "guess".

The Court: The answer may remain.

Q. Where was he standing when you came back?

A. I don't know. I can't say where he was at when I got back.

Q. How many wrenches of this same type did you have in the tool chest of the pump room?

A. Oh, I would say three of the same type.

Q. Three of the same size?

A. That's right.

[fol. 77] Q. Which one of those three did you give him?

A. They are all three of them are just good.

Q. You say "good" what do you mean by "good"?

A. They weren't chipped or anything; they were in good condition.

Q. When did you examine them to see that they were in good condition?

A. Just before I took them out of the tool chest, because they only use them wrenches once a year.

Q. Can you tell us what time of the day you examined those wrenches?

A. No, I can't tell you that.

Q. Can you tell us whether there was any identification mark on any one of those wrenches you selected to give him?

A. No.

Q. Now, you didn't observe him at all doing his work, did you?

A. No, sir.

Q. Did he complain to you about the wrench slipping off of the nut?

A. No, sir.

Q. Did he complain to you about the lighting conditions?

A. No.

Q. Did you see the wrench slip off any of the nuts?

A. No, I didn't.

Q. You were working on the same job on the other centrifugal pump, weren't you?

A. Yes, sir.

Q. So, therefore, you were using one of the other wrenches, isn't that true?

A. That's right.

Q. And that wrench was specially built to fit that particular nut for that particular job, is that right?

A. Yes.

Q. Were those the same wrenches that were on the vessel when you came there twelve years before that?

A. No, I got a new set of tools there while I was there.

Q. How many years ago—eight years ago?

A. No, I would say it might be five years ago.

Q. So, therefore, these tools had been used four or five years, is that right?

A. That's right.

Q. And that is heavy work, isn't it, down there?

A. I wouldn't say, not too heavy.

[fol. 78] Q. Don't you have to strike that wrench with a lead mallet?

A. You strike it, yes, to get the nuts loose.

Q. Why are those nuts so firmly put on?

A. That is to form a gasket there so the pump won't leak.

Q. When you use that wrench you have to hit it with strength to get the nuts off, don't you?

A. Yes.

Q. And they are put on there pretty solid?

A. Yes.

Q. And you say that there was nothing wrong with the edge of those wrenches after being in use for five years, is that right?

A. That's right.

Q. Did you hear any tools drop?

A. No.

Q. Did you drop any tools?

A. Not that I remember.

Q. You don't remember if you dropped any tools or not?

A. I would say no.

Q. Did you throw any tools down?

Mr. Ray: I object.

The Court: Sustained. What he did isn't important here. If he dropped something it wouldn't be important. The question is did your man drop something?

Q. You said in direct testimony that he never mentioned anything to you about dropping the wrench on his left great toe, is that right?

A. That's right.

Q. You weren't his roommate, were you?

A. No.

Q. When did he leave the vessel in 1955, or the Winter of '56?

A. I think around January 5 or 6, when everybody got off.

Q. Was he a good workman?

A. Well, he worked with me, he worked all right.

Q. Now, when you came back to the vessel in March of 1956 did he help you again?

A. I don't remember. I don't think so.

[fol. 79] Q. You don't think so. Now, see if you can recollect, Mr. Hansen, was that the only day he worked with you, the day in question?

A. That's right, as far as I remember.

Q. Thereafter, outside of that only day that he worked with you, you never had any conversations with him from the time that he worked with you up to the time you all

left the ship, during the fit-up or getting the vessel ready for navigation, you never talked to him at all, did you?

A. No, sir.

Q. So, therefore, when you say he never talked to you or said anything to you, you are putting it just to one day he worked with you.

Mr. Ray: Wait a minute, I object.

The Court: You have no right to summarize things for the jury until you come to argue it. That question is stricken.

Q. Can you tell me where the lights were in the pump-room?

A. Yes, sir, I can.

Q. Where were they?

A. There is two down there, one over each turbine pump, and then there is one in the center over the ballast pump, and two up in the ceiling.

Q. When you are talking about these electric lights coming through the dead-lights which are in the engine-room and firehold, they are not in the pumproom?

A. There are two overhead.

Q. Would you say those lights overhead were 27 feet away from where you were standing?

A. No, sir.

Q. How many feet would you say they were away?

A. They may be 20 feet.

Q. Would the 20 feet be from the cat-walk?

A. From the top of the cat-walk.

Q. 20 feet?

A. Yes.

[fol. 80] Q. How do you know that?

A. Because the tank, up to the top of the deck is supposed to be 27 feet, but by the pump there they have a double bottom underneath, and that is about three feet, maybe two and a half or three feet, then you have four feet up to the cat-walk.

Q. Do you know whether those lights were 100 volts apiece?

A. It is 120 watts.

Q. 120-watt bulb?

A. Yes; that is the two overhead.

Q. They were 20 feet away from the pumps, is that right?

A. That's right.

Q. On the day in question were you using a portable extension light?

A. There is a portable extension down in the pumproom.

Q. Were you using that on your pump?

A. I don't think so.

Q. Who was using it?

A. They have that hanging in the middle of the pump-room down there.

Q. On that particular day was it over your pump or in the middle?

A. In the middle of the pumproom.

Q. Where did it come out to?

A. Up on deck.

Q. Who put it in the middle of the pumproom?

A. I did.

Q. Handing you Defendant's Exhibit C, kindly indicate where that portable extension cord light hung.

A. I can't see it here. It is farther this way.

Q. Would you be kind enough to indicate on Defendant's Exhibit A where it was?

A. I can't tell it here either.

Q. Handing you Defendant's Exhibit B can you tell it from that picture?

A. No.

Q. Now, can you tell us—

A. It is in between here.

Q. Can you tell us where was the light, was it forward or aft of the cat-walk?

A. I would say it was aft of the cat-walk.

Q. Where was it rigged on, what portion of the pump-room was that extension cord rigged on?

A. Around where that bilge pump is, in the middle of the pumproom there.

[fol. 81] Q. How high was it hanging over the cat-walk?

A. Oh, I would say two or three feet.

Q. Now, can you tell us how that gave illumination down, using Exhibit B, can you tell us how that gave any illumination to your work?

A. I had it hanging over here. It would shine over there.

Q. What wattage was that bulb?

A. 200 watts—150 or 200.

Q. Do you know exactly?

A. I would say 150 at least.

Q. You are just guessing?

A. No, sir.

Q. Did you ever put a bulb in there?

A. I put that in myself.

Q. Do you recall what wattage that bulb was?

A. 150.

Q. Now, when a man working down in here, with the cat-walk here, how did that light reflect over that cat-walk down into that pit?

A. I don't know what you are trying to get to.

Q. I am just asking the question. How did that light reflect over the cat-walk down into the pit?

A. It is up high, only thing I can tell you.

Q. How can it get past the cat-walk?

A. Because it is on top of the cat-walk, hanging up on a piece of pipe.

Q. How high above the cat-walk?

A. About three feet.

Q. It was aft of the cat-walk?

A. Aft of the cat-walk.

Q. Can you tell us how the light shown down in the pit?

A. It would be shining down here.

Q. Doesn't it shine on this end of the cat-walk?

A. It gets all around.

Q. Any work you and Mr. Michalic did was pursuant to orders, isn't that true?

A. Yes, that's true.

Q. Any time while you were on the vessel around April 1st, 1956, were you told about Michalic's accident?

Mr. Ray: If the Court please, I object.

The Court: Sustained.

[fol. 82] Q. You have referred to these tools as being an alloy. Were some of those tools made out of steel?

A. No, sir. They are not allowed to have steel down in the pumphoom.

Q. What is the alloy they use in there?

A. I don't know what it is made out of. It is spark-proof, that's all I know. That's the Coast Guard regulation.

Q. What about the spectacle wrenches, were they made out of steel?

A. What are they, is that some other kind of wrench?

Q. They are used for this work, aren't they?

Mr. Ray: I object to that. There is no evidence of that.

The Court: Let me ask you, please, you are the one who asked for a separation of witnesses. You keep going back to one of your witnesses in the room. Please discontinue that.

Q. You said he worked on the port centrifugal pump. Are you sure that he worked on that one or the starboard one?

A. Well, I am not sure about that. I know I didn't work on the same pump.

Q. But you testified in direct examination that he worked on the port pump and you worked on the starboard pump. Are you sure of that?

A. As far as I remember that's right.

Q. These pictures were introduced in evidence. Do you see the port pump in these pictures?

A. This is the port pump here (indicating on Exhibit C). This is the starboard, and this is starboard (indicating Exhibits A and B).

Q. This particular wrench that you handed Michalic, can you tell us how long that wrench had remained in the tool box, before you had given that wrench to Michalic?

A. How long had that been in the tool box—you mean that day?

[fol. 83] Q. No, without being used.

A. I would say about nine months.

Q. Therefore, no one had looked at it for nine months up to that particular day, is that right?

A. It could be, yes.

Mr. Sampliner: That's all.

Mr. Ray: No further questions.

The Court: How often a year do you use this wrench?

The Witness: Once a year.

The Court: So you bought a new set of tools five years before and you used these wrenches five times in five years?

The Witness: That's right.

Mr. Ray: If the Court please, the defendant rests, and I desire to again renew our motion.

RENEWAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Ray: I am prepared, if the Court please, if the Court desires it, to outline the proof in this case to support the defendant's motion for a directed verdict. I will defer to the Court's wishes in that connection.

The Court: I suggest you argue it in full, take all the time you need on both sides.

Mr. Ray: If the Court please, the complaint in this case alleges that "some time during the month of December, 1955, on a day certain, within the knowledge of the defendant, and while the vessel at all times mentioned herein was upon the waters of Lake Erie, berthed at her dock in the Port of Cleveland, Ohio, and while in the pursuance of his duties under peremptory orders and exercising due care and caution for his own safety, the First Assistant Engineer before noon ordered the plaintiff to assist the pumpman in the pumproom, and while in the process of taking off the nuts on the pump, while using a heavy wrench, suddenly and unexpectedly the wrench slipped off the nut [fol. 84] and fell several feet and violently and forcibly struck the large toe on his left foot."

They further allege that the plaintiff "was ordered to perform said work in close quarters, using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective."

And this is what I want to bring to the Court's attention with respect to the plaintiff's Paragraph 5: "Plaintiff says that as a result thereof, he sustained severe and painful injuries, necessitating an amputation of his left foot below the knee."

Now, it is of no consequence that the proof in this case reflects the amputation is in fact above the knee, the thing that is important in that connection, and I intend to advert

to that in more detail later on in my argument, is that this is not a case in which aggravation is claimed; it is a case in which, from a medical standpoint, they allege and they were required to prove, if the Court please, from the standpoint of causal relationship, that the negligence of the defendant, the alleged negligence of the defendant, was the direct and proximate cause of the amputation. So we do not have an aggravation case here.

Now, the situation relating to the pumproom on the Orion is, we believe, substantially this: that on the day in question—and frankly, I was amazed to hear testimony which was subsequently stricken by the Court—perhaps I should not even allude to it—but the statement was made an arbitrary date was selected as the date when this accident occurred. Now, predicated upon the testimony that came from the plaintiff himself, I think we have to assume that an accident did occur and that that date was December 28, 1955. It is undisputed that the First Assistant Engineer gave orders to the pumpman to have the casings removed from the two centrifugal pumps, and that the pumpman was told that he would have help in doing that work. [fol. 85] Mr. Michalic did in fact go into the pumproom and assist in taking off the nuts that held down the casing of the pump. I don't think it is important one way or the other whether it was the starboard pump or port pump. It is undisputed both pumps are of the same type, have the same number of bolts and nuts, and it is also undisputed that an open face wrench was used by Michalic to take the nuts off and that he would use a mallet. Michalic himself testified in connection with the taking off of the nuts that he had taken off all but five of the nuts, and in response to a question by the Court, he said he assumed that there were about 20 of those nuts, so he had taken off 15 or 16 by the time the accident occurred.

I guess no one will know absolutely why the wrench dropped, if it did drop. I suggest a plausible explanation, if we are even permitted to speculate, that it could easily have happened if he hit the wrench with a particularly hard blow, it might be that caused the wrench to fly off the nut. In the light of the other testimony in the case, I say there is a substantial question in my mind, and I would think in the

jury's mind whether the accident even occurred, because with a case history of Buerger's Disease it would seem reasonable and plausible that had that wrench been dropped upon Michalic's toe, first of all the blow would have been very severe and there would have been an immediate bruising; and seamen, as a class, some of them are stoic and some aren't, but I would believe in this situation where had this type of accident occurred, certainly someone on that vessel would have known about it before the next Spring.

So we start in this case with what is known on the vessel as an unreported case. In other words, there is no report made to the officers, no accident report is made, so the owner has no notice of the accident until the man's toe reaches a condition where medical treatment is imperative, and then he goes to the First Mate and the Master in connection, I assume, with his application for a hospital ticket. He then tells them back somewhere, some time in December, 1955, while he was working on the pump, he dropped the wrench.

Now, I say to your Honor, considering the story as told by the plaintiff himself, there is a complete absence of negligence.

We are still of the view that the simple tool doctrine applies in this situation. Even if the simple tool doctrine does not apply we say the overwhelming proof in this case is that the tools were examined by the man in charge of them; that he has said the tool he gave to the plaintiff was in good condition; he has said the three wrenches used in the pumproom were purchased five years before that; and both he and the First Assistant Engineer said those wrenches are used solely for that job, are only used once a year, they are used in the lay-up to help remove the casing and they are used when the fit-out starts the next year when the casings are put back on the pump. And it is uncontradicted that those wrenches are made of an alloy so that they are spark-proof, and I would say that reasonable men could not disagree, in the light of the proof in this case, on the condition of those tools as to whether or not they were in good condition. The only person who has testified to the contrary is the plaintiff himself and he, obviously, has a stake in this lawsuit.

Before I leave that point, your Honor, the type of work that was being done was such that, assuming again that the accident occurred, it is the type of accident that may occur where there was an entire absence of negligence or unseaworthiness. In other words, you might hit the handle of that wrench with that mallet with such a blow it could fly out. In other words, it could be absolutely 100 percent perfect, the nut could be in perfect condition, the bolt could be in perfect condition, and if he didn't have hold of it firmly or if he hit it an extra hard blow the nut [fol. 87] could fly out. It is not the type of accident which would hold within it the factors or ingredients of negligence.

Now, I presume in the light of that, it is not too necessary to argue the matter of proximate cause, but there, again, I think there is a failure of proof, that the plaintiff hasn't sustained the burden of proof. All of the doctors who testified here testified, and were in agreement on this proposition that Buerger's Disease is a disease that no one knows the origin of, that there is no cure for, that it is a disease that has progressive stages, that the continuation of smoking has a definite effect on the ability to arrest it, and, if you will recall, Dr. Bright said unless this man stops smoking entirely why the chances are that he could have additional trouble with his other leg. The doctors called by the plaintiff testified that in their opinion that was a causal relation between the trauma which was sustained and the amputation, but all three of them had to admit that with Buerger's Disease you might have amputation without trauma, and Dr. Bright, who has had more experience in this particular field than all three of the doctors together called by the plaintiff, testified that in his opinion although the trauma might have speeded up the necessity of an amputation that as far as he was concerned it was simply an accident. If this man had stopped smoking in 1951 he would still have his leg today. And the proof which the plaintiff introduced through his witnesses, medical witnesses, with respect to the flaring up of the matter, has no relevancy in this case at all, because the plaintiff doesn't seek to recover for a flaring up of a pre-existing condition. He must base his right to recovery

upon negligence of the defendant being the direct and proximate cause of the amputation.

At the end of the plaintiff's case I discussed the ruling of the Supreme Court in the *Jacob v. New York*, and will not again refer to that at this time, but I do want to direct the Court's attention, first of all, to the language, and I [fol. 88] am now referring to the application of the simple tool doctrine, the holding of the Circuit Court of Appeals, Fourth Circuit, *Newbern v. Great Atlantic & Pacific Tea Company*, in which Judge Parker, speaking for that Court, reading from Page 525, says:

"It is well settled that, while it is the duty of the master, in exercise of reasonable care for the safety of the employees, to see that machinery and appliances which may cause injury to him are in reasonably safe condition, this duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects."

In connection with that I would suggest when Mr. Michalic took that tool from the pumproom he had an obligation at that time to examine it and if the wrench was defective in any way it was his obligation to bring it to the attention of the pumpman, and if the pumpman was unwilling to do anything about it, to bring it to the attention of the First Assistant Engineer who was the responsible officer on board. Now, that was not done. The Court goes on to say, after citing seven or eight cases in support of the principle I have just talked about, the Court goes on to say this:

"This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects [fol. 89] of such tools, that no inspection is necessary

to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the Master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery."

I will say to your Honor that in the decision of the Supreme Court in *Jacob vs. New York*, that doctrine I have just read to you is left untouched.

The other case that the Supreme Court refers to in the *Jacob vs. New York* decision is the case of *O'Hara vs. Brown Hoisting Machinery Company*, Circuit Court of Appeals, Third Circuit, 171 Fed. 394. The District Judge writing the opinion says this with respect to the duty required as to simple tools, I am reading from Page 396: "A mere imperfection in an implement or tool furnished by a master by reason of which bodily injury results to his servant does not necessarily import actionable negligence on the part of the former. One of the duties of a master is to exercise reasonable care and circumspection to provide reasonably safe tools and implements to be used by his servants, and he owes this duty not only to those of his servants who are to use them, but equally to other servants in close proximity to those by whom they are to be used. But the master is not an insurer either of the absolute safety or reasonable safety of tools furnished by him. The extent of the obligation resting on him in this connection is to exercise reasonable care and circumspection to provide reasonably safe tools and when he has done this he has fully performed his duty and cannot be held liable for the consequences of any undiscovered defects or imperfections in them."

Furthermore, the Court says: "The cases have established a limitation on the duty of the master to inspect tools [fol. 90] and implements used by his servants and to mend or repair the same with reasonable care. A distinction is drawn between common and ordinary tools used by ordinary workmen, who by the nature of their employment may fairly be considered competent to ascertain and remedy their defects resulting from use and wear, and tools of special con-

struction which for their maintenance in safe and proper condition require the attention of men skilled in the inspection and repair of similar appliances. To fasten on the master the duty of inspection with respect to such common and ordinary tools would place an undue and frequently insupportable burden on his shoulders, unreasonable to require and forbidden by the exigencies of business. The master is entitled to rely on the presumption that servants using such tools will seasonably discover defects of which the master has no knowledge or notice."

Now, that doctrine has been left untouched by the Supreme Court of the United States in the Jacob decision.

Now, with respect to the allegations of negligence that are not related to the wrench itself, as I told your Honor in the argument at the end of the plaintiff's case, the allegation with respect to the poor lighting and to confined quarters was graphically set at rest by the plaintiff himself when he testified that he had removed 16 of those nuts and that this accident occurred when only five remained. So it seems to be it is self-evident that he removed those nuts without any difficulty, and that the lighting must have been sufficient and the quarters were not too cramped.

We say, therefore, your Honor, that the vessel owner in this case has even gone beyond the requirements set forth in all the decisions as far as inspection is concerned. The proof is a proper tool was furnished by the plaintiff; and if the accident occurred, which we doubt because it was not reported for about four months, that it resulted from his own carelessness. That the great weight of the medical [fol. 91] testimony is that if instead of continuing work, which was the worst thing he could have done after the trauma to the toe occurred, if he had gotten medical treatment, and he more than anybody else should have known the necessity of that, having lived with that disease for four years, that the toe probably could have been saved and certainly there would not have been any amputation of his leg required.

In the light of all those things we believe there is not any evidence of negligence upon which reasonable minds can disagree and that the plaintiff has failed in establishing, even if the negligence of the defendant existed, that there

is a causal relation between the alleged negligence and the injury which he sustained, and we believe, therefore, that the Court should instruct the jury to return a verdict for the defendant on the first cause of action.

Mr. Sampliner: If your Honor please, there have been two important cases decided by the United States Supreme Court. The first case that I am going to talk about is the Rogers vs. Missouri Pacific Railroad Company case which was argued November 7, 1956 and decided February 25, 1957, recorded in 352 U. S. 500:

"In an action in a Missouri state court under the Federal Employers' Liability Act, brought against respondent railroad by petitioner, who was injured in a fall from a culvert while working in a section gang burning weeds beside the track and watching a passing train for hot-boxes, the jury awarded damages to petitioner. The State Supreme Court reversed upon the ground that petitioner's evidence did not support the finding of respondent's liability. This court granted certiorari: Held: the evidence was sufficient to support the jury finding for petitioner, and the judgment is reversed.

The Supreme Court of the United States said: "Under the Federal Employers' Liability Act,"—and the Jones [fol. 92] Act follows that Act, 46 U. S. C.—"the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury."

It went on to say:

"Cognizance of the duty to effectuate the intention of the Congress to secure the right to a jury determination in cases under the Act, this court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination."

Item 3: "The fact that Congress has not substituted a scheme of workmen's compensation cannot relieve this court of its obligation to effectuate the existing Act by granting certiorari to correct the improper administration

of the Act and to prevent its erosion by narrow and niggardly construction.

4. When this court has granted certiorari in a Federal Employers' Liability Act case, the litigants are entitled to the same measure of review on the merits as in every other case.

5. In actions under the Act, Congress has vested the power of decision exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot possibly differ whether fault of the employer played any part in the employee's injury."

Your Honor, the evidence in this case is evidence of divergent views. On one hand we have Michalic, the only other man in the pumproom, and the pumpman. Now, the pumpman's evidence is not to be considered any different than Michalic's, and consequently I say to your Honor that fair-minded jurors can honestly differ, and it is up to them to determine and not anybody else.

[fol. 93] Then Item 6 says: "Special and important reasons for the grant of certiorari in these cases exists when lower federal and state courts persistently deprive litigants of their right to a jury determination."

Your Honor, it seems to me in the case of *Ferguson vs. Moore-McCormack Lines*, in 352, the same volume, Page 521, the United States Supreme Court in that case, argued December 10, 1956, decided February 25, 1957, said as follows:

"Petitioner, an employee on a passenger ship of respondent, was injured in the course of his employment while using a sharp butcher knife to remove ice cream from a container in which it was frozen hard. In an action under the Jones Act, under which the standard of liability is that of the Federal Employers' Liability Act, the Federal District Court entered judgment on a jury verdict awarding damages to petitioner. The Court of Appeals reversed, holding that a motion for directed verdict for respondent should have been granted. This court granted certiorari. Held: There was sufficient evidence to take to the jury the question whether respondent was negligent in failing to

furnish petitioner an adequate tool with which to perform his task, and the judgment is reversed."

Now, your Honor, in this particular case I would like to read part of the opinion of Justice Douglas.

"Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (*Jacob vs. New York City*, 315 U. S. 752; *Schulz vs. Pennsylvania Railroad Company*, 350 U. S. 23), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out [fol. 94] the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him." They cite *Schulz vs. Pennsylvania Railroad Co.* "Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in *Rogers vs. Missouri Pacific Railroad Co.*, ante, p. 500 decided this day, is relevant here: 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'"

I emphasize "played any part, even the slightest." I again emphasize "even the slightest, in producing the injury or death for which damages are sought."

Now, in the famous case of *Jacob vs. New York City*, which was the case where the plaintiff suffered a fall caused by the use of a defective wrench, I again repeat what the Court said on Page 752:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen,

whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." In this case, it went on, the jury is to consider whether injury was caused by any defect due to respondent's negligence.

Now, your Honor, on Pages 97 and 98 of the court reporter's notebook in this case we find the evidence that Michalic complained. In the Jacob case we find the petitioner inspected the wrench and found it defective and asked the Chief Engineer for a new wrench three times. I say, what difference does it make if he protested once or three times? The Court in that case said it was for the [fol. 95] jury to say whether respondent's failure to comply with the repeated request was negligence on its part.

Now, your Honor, we go to the pleadings which have been referred to in this case:

December 28, 1955, has been stated or alleged to be the date of the accident. Although it could mention the exact date—I do not have that handy decision, but I do know of other instances under the Federal Rules of Civil Procedure, where we use what is known as the short form, I would say the most abbreviated form, which means it must give a notification to the opposition of the claim. The one phase that is important is the fact that there must be a notification, and the important thing is whether or not the defendant has been apprised of what we contend. Now, in this case the Steamship Company filed an amended answer, and they found out certain things in the taking of depositions and otherwise, and they were so permitted by leave of court, so they cannot claim any element of surprise. A deposition was taken of the plaintiff, and they were apprised of all the conditions which we have pleaded.

Mr. Ray: We claim no surprise. I will concede that, if Mr. Sampliner wants to go on to another matter.

Mr. Sampline: Therefore, we get down to the one thing, are we going to say in this court that the Supreme Court of the United States is not to be regarded, by reason of the decisions in the Rogers case and the Ferguson case? I say to you all we have here of any testimony is absolutely one against the other—the seaman who is without his leg, and on the other hand the pumpman who has worked 12

years on the same vessel, the Orion. On one hand we have Michalic saying that this is what happened, and this is the type of tool, and this is the place afforded me to work.

Now, your Honor, I say to you that I have elicited from these two witnesses of the defense that an order was carried out, a peremptory order was given.

[fol. 96] Now, I direct your Honor's attention to the cases cited in our brief, and among them—

Darlington vs. National Bulk Carriers, 152 Fed. (2d) 817; Dayton vs. Midland S.S. Lines, Inc., 110 Fed. Supp. 418; Schucker vs. United States, A. M. C. 1192 (S. D. N. Y.); Hanson vs. Luckenbach S.S. Co., 65 Fed. (2d) 457; Kangadis vs. United States, 121 Fed. Supp. 842; Jaarkolski vs. Groves, 84 Fed. Supp. 493.

Now, your Honor, there are four items of negligence in this case—well, I should say five. First of all, the plaintiff acted under peremptory orders; second, ordered into an area the jury can determine whether or not a dangerous area, whether it was adequate and safe, according to the exhibits, whether there was sufficient illumination. We have one man saying these tools were used only once a year. That is for the jury to determine whether they were, or reasonable minds could differ. On one hand Michalic says the tool was chewed and worn off, that one particular tool; on the other hand the pumpman, Mr. Hanson, says it was in perfect condition. Next, your Honor, there has been a complaint about the wrench, as shown from Pages 97 and 98 of the reporter's notes. Another point is, did the defective tool create an unseaworthy condition, and that is liability, almost ipso facto.

Now, your Honor, the four or five points which I have mentioned are questions absolutely for the jury, and since reasonable minds will differ they are the only ones who can decide those questions.

We believe that under the authority of the Supreme Court in the cases we have cited, this case must go to the jury, and on the point of maintenance and cure, where we have diversity of citizenship here and a case for a jury

determination I leave the matter for your earnest consideration.

[fol. 97] Mr. Ray: As far as the question of diversity, I don't think that is at issue, if the Court please.

ORAL OPINION ON DEFENDANT'S RENEWED MOTION
FOR DIRECTED VERDICT

The Court: Let me start where Mr. Sampliner left off. It is true when you were asking questions of the prosthesis man from Detroit we sustained objections because you asked a variety of questions which were improper. Had you asked the question of the cost it would have been admitted, should have been admitted. You never made any effort to ask that, but I assume whatever the bill is you have got it and there is no question on its mere presentation it will be accepted.

This has been a case which has caused us some worry in some respects, particularly as we look forward to what appear to be the prospective proximate causes with which the jury might have been concerned, if the jury was going to be concerned. We have the original possible proximate cause that the man's condition could have been caused had he had the condition back in '48. The jury might well have found that the leg would have come off anyway because of the condition, or there could have been an aggravation of the condition caused by the man's own conduct, in that he never abated the smoking habit until very, very recently, and then not completely. In other words, for whatever reason, he would not give up smoking, knowing it was the most dangerous thing in the world for him. That was the second possible proximate cause.

Then you have the possible cause of trauma here, if trauma would have been found by the jury to have hastened what happened. But at no time was any medical man asked any opinion as to the degree to which it would have been hastened, and the jury, if they would have gotten the case, would have no information to go on other than the fact it was hastened.

Of course, there was always the fourth possibility that the jury might say a man with such a history, such a terrible

illness, and it is a terrible illness, why the Lord permits it [fol. 98] is His business, no one seems to know what starts it, there was a possibility a jury would figure a man who would have such an illness would have run and reported it the minute he hurt himself, knowing the prospect he had of a very serious injury as the result of a very serious injury to himself for which his employer was in no way responsible. The fact he didn't report it for some months might be considered as some evidence by the jury he was never hurt in the way in which he says.

This business of Buerger's Disease has reached the point where there is quite a bit of elucidation about it. The man had numbness in his leg in 1949, he had a sympathectomy in 1951; hit the same toe with a fire brick in '51 or '52; never stopped smoking. Then we had the experts who really told us about this amputation business, as far as they are concerned. Dr. Bright said out of a 150 to 170 cases 15 percent of those who wouldn't quit smoking lost their foot. Dr. Silbert in New York was reported to have said, and he is apparently the highest authority in their specialty, that out of 436 cases that stopped smoking he avoided amputation.

Now, then, the petition set up the claim with reference to what was wrong with the wrench—"using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective". Never, from one end of the lawsuit to the other, has the word "teeth" been used of that wrench. There has never been one mention of the fact the teeth were worn. Never has there been a mention of the fact the grip was worn, not one iota of testimony. And after I called this to the attention of all counsel on motion at the end of the plaintiff's case, the plaintiff's counsel sought to rehabilitate himself on the wrench with the cross-examination of defense witnesses, and successfully proved the wrench had no teeth. As a matter of fact on that type of wrench there are no teeth, so there is no iota of evidence the teeth had been [fol. 99] worn and no iota of evidence that the grip was worn, and the grip has not been mentioned from the time of the lawsuit to this minute.

So the plaintiff has proved no part of his contention with reference to defect; and the defect in the wrench is the foundation of the plaintiff's claim here.

I know the plaintiff mentioned the fact the wrench wasn't any good. The pumpman says they never discussed any such thing. Now, as Mr. Sampliner says, what the pumpman said could be considered by the jury, as between what two witnesses say, one of whom was working for the defendant, should it get that far. The pumpman say "this is a tool I bought five years ago and there are three of these on this ship"; they are used for only one purpose once a year; "we use them to take the nuts off the pump head casing; and having been used just five times in five years there is absolutely nothing wrong with the wrenches." Should a jury be called upon to decide as to which of the two contending witnesses was right, when the plaintiff had only testified there was some defect in the wrench, and he starts out on the theory the teeth are worn, and there are no teeth, and he starts out on the theory the grip is worn, and there is never any mention of the grip in the case until I mentioned it right now?

For authority they tell me what the Supreme Court has required. That's why we checked the case Mr. Sampliner mentioned, and I called counsel's attention to it after plaintiff's case was completed, because of the detailed description there given of that wrench which was considered to be improper, and in that case there is given quite a bit of description about the wrench, what it would do and what it would not do, and why it slipped. We do not have that here. All we have here is the conclusion of the plaintiff, the conclusion it is defective, it is worn, it is an old wrench, chewed-up wrench. Nowhere in this case is there anything [fol. 100] on which this jury could ever be called upon to decide to what degree the teeth had been worn and to what degree the grip had been worn because neither the teeth nor grip have been mentioned since the time the lawsuit began.

Now, in the Jacob case, as I said before, it was a case where the Court said it was a close question, a closely-decided case, because as I said before three of the Judges of the top court were on one side of the fence and three on the other and they were evenly divided. They go on to say

what the jury might have been called upon to have decided. That is to say, it was for the jury to decide whether a monkey wrench was a reasonable safe and suitable tool. It was said that if he hadn't liked the wrench he used, he could have used another wrench, so the Court said the jury should have decided whether a monkey wrench or a prospectively substituted wrench should have been used, and whether it was reasonably safe for the work in hand. Next there was a question whether the respondent's failure, when it had two or possibly three weeks to supply the petitioner with a new wrench, amounted to negligence. That man had complained about the wrench in the three weeks three times, and he had to use it every time the boat made a trip across the river, and it was crossing the river all the time, and each day he had to take nuts off some part and put them back.

We have no such situation here. So, actually, what they said there was that the case should have gone to the jury on the ground whether the ship company was negligent for having failed for a period of three weeks to get the man another wrench.

Here we have no proof of defect. We have a conclusion about an alleged defect. And the question that we must also then consider is if the jury has nothing to go on but the conclusions of this plaintiff, then must we submit the case to them? A man takes the stand and says, "I had a [fol. 101] tool which was defective". Period. That's what this man said. He has come to the conclusion which only the jury is allowed to reach. Now, must they be given the case to decide whether or not they will accept his conclusion, when they are not given evidence of the facts on which his conclusion is based?

I think the obvious answer to that is it simply cannot be done.

Now, let's get down to his work. At one point in the case it was stated there were 35 or 40 nuts to be handled, another point 25, and another point 20; and another point it was said he had taken off all but four or five or six or seven nuts. In any event the tool seemed to do very well up to a point where something happened. He demonstrated how he hit this so-called grip of the wrench—he never used the

word grip, I used it—with the hammer, holding it in the left hand and striking down with the right. I don't know whether he was tightening the nut or not, but it looked like he was. It has been suggested maybe he hit it too hard. I do not know. All I know is what the evidence has shown, that it had a smooth jaw. That was brought out on cross-examination by plaintiff's counsel, when plaintiff's counsel did seek to rehabilitate his case because at the end of plaintiff's case I had suggested that there was no proof, in accordance with the petition, with reference to the claim set up. So plaintiff's counsel, and very properly so, that is his privilege and his right and duty, was trying to show if he could on defendant's proof he had a case, and the only evidence he elicited was that it was a smooth wrench.

Now, it is claimed by the complaint that this was a worn tool. The proof was that it had been used five times. The claim is it was defective, and beyond using the word, there is no proof wherein it was defective, no proof the teeth were worn, for it had no teeth, and no proof its grip was worn because grip was never mentioned until I decided to talk about it here. None of the allegations set forth in the [fol. 102] petition are proven, and no effort to correct or amend the petition, and no suggestion a mistake had been made and there was something else wrong with it.

Incidentally, while I put it on the record, it is really off the record, I asked counsel three or four times in pre-trial wherein this thing was defective, and all the answer I was ever able to get was that it would come out in the lawsuit, and the answer that it would come out in the lawsuit is no answer at all.

So this gentleman either got 15 nuts out of 20 or he got 34 out of 40, either way, he wasn't doing too bad a job with the wrench, and it is probably no wonder because the wrench had been used on five other occasions and probably was in splendid shape.

It, finally, does not have the defects claimed and no other defects are suggested. What could the jury be called upon to determine with reference to the wrench? Wherein can reasonable minds differ on what we have here? What defect has plaintiff talked about concerning which the jury could be called upon to judge whether there is a defect

there or not? Is it that the teeth are worn, when there are no teeth? Or that the grip is worn, when the grip has never been mentioned? Or am I required to hand to the jury just a conclusion of a plaintiff, who of course has an interest in the case, which is understandable, but who merely says, "It is worn. It is defective. It is chewed up. And for that I want \$350,000".

A man has been carrying a defect, and it is too bad he does, for some eight or nine years, or longer for all we know. He is very conscious of it. He had been operated on to stop the pain, cutting the nerves to stop the pain. The condition goes on. But the point is, I suppose to a degree he could have had this same thing happening in another way. He could have got it on another ship he was on, or perhaps got it on no ship. But he is the only one to decide that, the only one who should decide it.

[fol. 103] I would assume the highly-specialized counsel in the Court Room learned quite a bit about Buerger's Disease in this lawsuit as I did, and everybody else listening to the doctors. There is not much disagreement about this.

He washed the foot, he did nothing to stop smoking except very recently, to prevent aggravation of that condition which has been going on since 1948. He could have got it if he never hit his foot, of course we don't know if he hit his foot, nobody knows but him. There is always the possibility if he did hit his foot he would have reported it instantly, because no one knew better than him the implication, the future he had immediately on hurting himself, if he hurt himself. The fact that he didn't report it, kind of militates against his claim that he did hurt himself.

Much is said about the lights here. Since plaintiff said he had no difficulty in seeing the nuts when he took them off, I don't think the lights are involved in the case at all.

Counsel in his last discussion talked about how cramped the space was. Well, we have seen the photographs. It is not cramped to the point where he couldn't get at the casing; the other man got to his.

Counsel for plaintiff suggests, oh, he wasn't used to this, he was a fireman. Sure he is, but the testimony seemed to be part of the job when they lay-up and fit-out was to do the very work around this pump they were doing. Of

course, he couldn't have had much experience doing it, nor would he need much. He was around the ship a few years and once a year they did the work, which is the reason why the wrench probably wasn't worn at all, probably was just as smooth as his immediate superior related. He said there were no worn places, it was in good condition, and that the plaintiff never complained to him about it. He testified that he had three wrenches all of the same size, all three good, they weren't chipped. He checked them when they came out of the tool chest, and he was cross-examined when he checked them, but he said nine months before, [fol. 104] meaning they hadn't had to look at them since they put them away, there was no reason to look at them, meaning it was about as unused a tool as there was on the ship, because once a year they got it out for these 30 or 40 nuts. Pretty much as you would remove a tire when you get a flat and have to take off a half a dozen nuts. You don't wear out your nuts or bolts; you don't wear out wrenches using them once a year for five years.

I will say again, gentlemen, I don't see anything here on which reasonable men could differ. So I find not one iota of evidence on the claims set forth in the complaint, which has never been modified, changed or amended at any time or any claim suggested that it be so amended.

I see no reason for discussing the simple tool doctrine. I do not think in the Jacob case the Supreme Court intended to abrogate it and so it has no application. I am not called upon so to say. My question is, is there any evidence concerning which reasonable minds on a jury might differ? No negligence has been offered for the consideration of this jury in the form of such defects in this tool as have been complained of throughout this case, and reasonable minds could not honestly differ as to whether the teeth in the wrench were worn when there are no teeth in the wrench, and reasonable minds could not honestly differ as to whether the grip is worn, when the grip isn't mentioned from the time the case began until I mentioned it in this little discussion.

Since there is no proof in this case I grant the motion here.

Mr. Sampliner: We note an exception here and we will appeal.

[fol. 105]

IN UNITED STATES DISTRICT COURT

ORDER—February 27, 1958

In conformity with Rule 77(d) of the Federal Rules of Civil Procedure please take notice that the following order or judgment was entered on Feb. 27, 1958. C. B. Watkins, Clerk, U. S. District Court, Northern District of Ohio.

Upon a verdict of the jury, by direction of the court, finding for the defendant on the first cause of action, and for the plaintiff on the second cause of action, for maintenance and cure, in the sum of \$2,610.00,

It Is Ordered that the first cause of action is hereby dismissed.

Further, It Is Ordered that plaintiff recover from the defendant, on the second cause of action, the sum of \$2,610.00 and costs, for maintenance and cure.

C. B. Watkins, Clerk.

[fols. 113-114]

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 23, 1959

(omitted in printing)

[fol. 115]

[File endorsement omitted].

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13,580

THOMAS S. MICHALIC, Plaintiff-Appellant,

—v.—

CLEVELAND TANKERS, INC., Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Ohio, Eastern Division.

OPINION—Decided October 29, 1959

Before Simons and Allen, Circuit Judges, and O'Sullivan, District Judge.

PER CURIAM:

This action by a seaman, under the Jones Act (Title 46, U. S. C. A., Section 688), concluded by the District Judge's direction to a jury to return a verdict of no cause of action. The propriety of such direction is the matter here for review.

For some years prior to December 28, 1955, plaintiff had been suffering from Buërger's disease. In 1951 he was hospitalized from an injury consequent upon dropping a sack of cement on his foot, although which foot was not disclosed. In 1952 he was again hospitalized and he then

learned that he was suffering from Buerger's disease in his left foot. Some surgery, including the cutting of a nerve in his back, was performed for the purpose of relieving pain which he was then suffering in his left leg.

He claims that on or about December 28, 1955, while using a wrench to remove nuts on a pump housing on defendant's vessel, the wrench, when he struck it with a mallet, slipped and fell, striking the big toe in his left foot. Without interruption, he continued working on the [fol. 116] vessel until the conclusion of the lay-up in January, 1956. He rejoined the vessel on March 15, 1956. Plaintiff testified that after a few trips on the boat his leg became so bad he could no longer stand it. He then told his superior officers he wished to get off the boat and asked for a hospital ticket. This was on April 1, 1956. He then, for the first time, told of the claimed incident of the dropping of the wrench. Until then he had told no one of the incident, although he testified that his toe had begun to bother him immediately following the occurrence, requiring him to bathe it rather continuously while on the boat and after the season of navigation while ashore. He did not tell of the accident to the pumpman who had been working with him in the pumproom on the day it occurred. He said he did mention it to a couple of deckhands. Upon receipt of the hospital ticket he went to a Marine Hospital where several amputations were performed, the final one resulting in the amputation of his leg above the knee.

Plaintiff's complaint charged that the vessel and its equipment were unseaworthy and that the defendant was negligent. Aside from some general conclusory allegations of negligence and unseaworthiness, his specific charges upon which he relied for a cause of action consisted of assertions—

That the defendant did not provide a safe place or way to work; that defendant provided him with a defective wrench, knowing that, "the teeth of the wrench would not hold or be secure"; that defendant ordered and permitted him to work in close quarters; that defendant should have known of a defective condition of the teeth of the wrench; that defendant failed to provide him with a proper and secure wrench which would not loosen when average pres-

sure would be applied; that defendant failed to provide adequate, proper and seaworthy and safe appliances, to wit: a proper wrench without worn teeth; that defendant failed to maintain a proper lookout for the plaintiff, and failed to supervise the removal of the nuts off the pump, and to replace a defective, old and unseaworthy wrench; that defendant failed to provide plaintiff with skillful, careful and competent co-employees.

On the trial it was disclosed, without dispute, that the wrench being used by plaintiff did not have any teeth in it, but was an open-end wrench, with a jaw opening of about 1 $\frac{3}{8}$ inches, approximately 12 inches long and weighing [fol. 117] 2 $\frac{1}{2}$ pounds. It was made of spark-proof alloy metal. Plaintiff was also provided with a metal mallet for the purpose of striking the wrench in the process of loosening the nuts.

On this review, we accept plaintiff's proofs as true and in their most favorable light. Plaintiff and a fellow workman described the condition of the tools with which he was working variously as follows:

"It was a big wrench, old, beat up wrench."

"An old lead mallet they used in the pumproom."

"It was an old wrench, all chewed up on the end."

He testified he told the pumpman:

"This tool is not very good, kind of beat up. This wrench keeps slipping off."

The pumpman said:

"Never mind about that, do the job the best you can."

A former Mate and Captain of the vessel who had been discharged by defendant, described the tools being used in the pumproom in December, 1955, as being,

"in beaten and battered condition * * * they had been very beaten and battered."

Although plaintiff's pleadings made no charge of inadequate light or cramped quarters in the pumproom, the following testimony was received on these subjects:

As to illumination, plaintiff said, "to my estimation, it was poor, very poor."

"Q. Did they have any other electricity?

"A. No, sir, they only had shore lights that's all.

"Q. As far as the illumination in that room, what other illumination was there besides the portable light?

"A. Nothing, that's all we had, just the portable light.

"Q. And where was it hanging?

"A. The portable light was hanging over the pumpman's pump on the port side. He had a string tied to it and it was hanging right down beside his pump."

Referring to the portable light in the pumproom, he stated:

"I attempted to move it over to where I was, but it was too short, it wouldn't reach my pump at all."

"Q. Was there any light provided at the catwalk in that area at all, other than what you have described.

"A. No, sir."

Referring to the portholes between the engine room and pumproom, plaintiff said:

[fol. 118] "Those portholes were all dirty and greasy from grease flying around the pumproom."

A fellow workman testified in relation to the light:

"Well, the pumproom wasn't too large. It wasn't a large pumproom and the lighting wasn't too good. In fact, we had to use an extension cord."

The former Mate of the vessel, referring to the lighting in the pumproom, said:

"Very poor. In this lower level at all times it was necessary to use a flashlight in order to see anything in working on this grating level or below."

As to the cramped space in the pumproom, plaintiff testified:

"I was ordered to go into the pumproom. This is the catwalk going from one end of the ship, from the starboard to the port side . . ."

"Q. Now, did you have to get off the catwalk?

"A. Yes, sir. I had to get off that catwalk, and I had to crawl between four beams that hold the pump from vibrating, work underneath the catwalk.

"Q. As you were working there you stated you had to get between four beams. Can you describe them a little bit?

"A. Yes, I can. The four beams they help the pump. When the pump is pumping out cargo in a port, the four steel beams that come around the pump keep the pump from vibrating when they are pumping out.

"Q. What is the distance from the top of the pump to the catwalk where you had to go in there and work?

"A. About six inches.

"Q. Is that the area you had to work?

"A. Yes."

The above constitutes substantially all of the evidence relevant to the conditions in the pumproom and the condition of the tools with which plaintiff was working. There was no testimony in any way supporting a claim that the slipping or dropping of the wrench was brought about by, or related in any way to, the lighting conditions of the pumproom or to the smallness of the area. Plaintiff had actually removed all but five of an estimated total of twenty nuts before the wrench fell. He makes no claim that the progress of his work was in any way impaired or made more difficult by inadequate lighting or cramped quarters.

"Q. You had no difficulty seeing the bolts, did you?

"A. No, sir."

[fol. 119] Plaintiff's description of the accident is as follows:

"Q. What happened after you took off the bolts and nuts?

"A. After I started taking the bolts off with the old wrench, only about three or four more to get loose, a couple of them, I had hold of a nut . . . and I hit the wrench and it slipped off and it hit me on the foot at the big toe."

"Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped?

"A. I had them all off but about five or six.

"Q. You took those off without difficulty?

"A. I had a hard time loosening them off.

"Q. But you got them off?

"A. Yes.

"Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and then you turned the nuts off?

"A. I had a hard time taking them off.

"Q. But you took them off?

"A. Yes. The pumpman told me, 'Do the best you can'.

"Q. You got them off, and you got all but how many off at the time the accident occurred?

"A. About five.

"Q. And you were using the same wrench?

"A. The same wrench.

"Q. And the same mallet?

"A. Same mallet all the way through."

"Q. Did you become aware that this wrench as you have described, was getting worn as you were taking these nuts off?

"A. I told him about it, yes sir.

"Q. Did you go out and try to get another wrench out of the box?

"A. No, sir, he told me 'You do the best you can with that wrench right there.'

"Q. He told you not to use another wrench?

"A. He said, 'You do the best you can with that wrench right there'.

"Q. That's the only wrench you could use?

"A. The only wrench that I had to use."

"Q. Now, will you describe with as much particularity as you can just how the wrench slipped off the nut?

"A. Like I say, I had the wrench in my hand.

"Q. You were standing next to the pump?

"A. I was standing. I got hold over here, and I hit it with [fol. 120] the mallet and it slipped off the nut and came down the side of the pump and hit my big toe.

"Q. You hit the handle of the wrench with the mallet?

"A. Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe.

"Q. That's exactly the way you did it on all the others?

"A. I had to use the mallet on all the nuts, that's right. They were pretty tight.

"Q. In other words, you had gone through the same maneuver on the others as you had with this?

"A. Yes, sir.

"Q. Did you have any difficulty putting the wrench on the nuts before hitting it with the mallet?

"A. Yes, sir, they slipped.

"Q. What slipped?

"A. The wrench did."

.

"Q. I am talking about putting the wrench on the nuts. Did you have any difficulty putting the wrench on the nuts you took off?

"A. I told you the wrench was slipping off the nuts. It slipped off every one of them."

A fair reading of the District Judge's oral opinion given when granting the motion for a directed verdict, indicates his conclusion that there was no evidence from which the jury could make a finding of negligence or unseaworthiness. We concur in this conclusion and further express our opinion that there was a failure of proof as to any causal connection between the conditions which plaintiff complained of, namely, improper lighting, close quarters and improper tools, and the injury which he suffered.

Neither by accepting plaintiff's proofs in their most favorable light nor by drawing all legitimate inferences therefrom, can it be said that insufficient light or cramped working space had anything to do with the slipping of the wrench which was the immediate cause of the plaintiff's injury.

We come, then, to consideration of whether there was any evidence from which a jury could find that negligence

of the defendant or unseaworthiness of the vessel and equipment in any degree contributed to the slipping of the wrench and its falling upon the plaintiff's foot. The allegation of the complaint with reference to teeth of the wrench being worn was abandoned upon showing that it had no teeth, but was an open-end wrench. To say that a wrench is old, beaten, battered or chewed up gives no information as to whether or not the wrench was adequate [fol. 121] or inadequate to perform its function of loosening a nut. Neither do the above adjectives tell whether the grip of the wrench was in any way impaired or it was otherwise an unsafe tool. The plaintiff's evidence did not disclose what part of the wrench was beaten, battered or defective, except that it was "chewed up" on the end. There was no evidence of any improper design of the wrench or the mallet. The evidence discloses no claim or inference by plaintiff or his witnesses that the wrench slipped or fell because of any inadequate grip, nor that the wrench slipped or fell because the jaw of the wrench did not properly fit the nuts which were to be loosened by it. There was no evidence that the open or jaw end of the wrench was in any way deficient. We do not think merely stating that the wrench was beaten, battered, old, or chewed up is sufficient to allow an inference that it could not be used safely in the function for which it was designed. Evidence that the wrench was beaten, battered or chewed up, without other definition, was insufficient, in our opinion, to permit a jury to find that these thus described conditions, or any of them, were the cause of its slipping. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench. There is no evidence from which it could be inferred that some condition described in the evidence contributed proximately as a cause of the slipping.

The recent cases of *Rogers v. Missouri Pacific Railway Co.*, 352 U. S. 500, and *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521, relied upon by appellant, emphasize the jealousy with which today's courts guard the rights of injured workmen to have their causes submitted to a jury where there is any evidence, however slight, to justify a jury's factual finding of liability. The rule that the

plaintiff in such a case as this has the obligation to produce some evidence to prove, or permit a justifiable inference of, negligence and proximate cause is, however, still a part of our law. It is the function and duty of trial courts to determine whether or not in a particular case there is any evidence to justify the submission of a case to a jury.

In the case of *Ferguson v. Moore-McCormack*, supra, the Supreme Court affirmed the rule that the standard of liability under the Jones Act is the same as applied in [fol. 122] actions under the Federal Employers' Liability Act. In a case arising under the latter Act, the United States Supreme Court in the case of *Moore v. C. & O. Railway Co.*, 340 U. S. 573, 575, said:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident."

We approve the ruling of the District Judge that the plaintiff in this case failed to provide any evidence from which a jury could find liability. It should be noted here that on his second cause of action for maintenance and cure, plaintiff recovered \$2,610.00. No appeal was taken from that judgment.

The judgment of the District Court is affirmed.

[fol. 122A]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—October 29, 1959

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 123] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 124]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1959

THOMAS MICHALIC, Petitioner,

—v.—

CLEVELAND TANKERS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—January 28, 1960

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 28, 1960.

Potter Stewart, Associate Justice of the Supreme
Court of the United States..

Dated this 28th day of January, 1960.

[fol. 125]

SUPREME COURT OF THE UNITED STATES
No. 666—October Term, 1959

THOMAS MICHALIC, Petitioner,

—v.—

CLEVELAND TANKERS, INC.

ORDER ALLOWING CERTIORARI—March 7, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PET
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